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Report on Vicarious Liability under the *Motor Vehicle Act*

LAW REFORM COMMISSION OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL

LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON VICARIOUS LIABILITY UNDER THE MOTOR VEHICLE ACT

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To The Honourable S.D. Smith, Q.C.
Attorney General Of The Province Of British Columbia:

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON VICARIOUS LIABILITY UNDER THE MOTOR VEHICLE ACT

Vicarious liability is a concept used in the *Motor Vehicle Act* to define the legal position of a person who owns a vehicle driven by another person in a way that gives rise to civil liability, or violates provincial law. Broadly speaking, the Act imposes liability on the owner of the vehicle for wrongs or offences that are committed by the operator.

Vicarious liability, as used in the Act, raises a number of important issues. These arise out of a tension between the ends and the means. The goals served by vicarious liability are undoubtedly worthwhile and in the public interest. As a legal technique, however, it is difficult to reconcile with the widely-held view that only blameworthy conduct should attract punishment or liability -- a view reflected, at least in part, in the *Charter of Rights and Freedoms*.

In this Report, recommendations are made to modify the application of vicarious liability for offences by adopting alternative strategies. Recommendations are also made to clarify the meaning of "owner" for both civil and penal liability under the Act.

CHAPTER I INTRODUCTION

The use of a motor vehicle is an inherently dangerous activity, and a large body of the statute law of this province is devoted to its regulation. The most important, and perhaps the most familiar, enactment is the *Motor Vehicle Act*.[1]

The *Motor Vehicle Act* has two primary goals. The first is to reduce the frequency of road accidents. To do this, for example, the Act provides a scheme of driver licencing to ensure that persons who operate motor vehicles meet certain minimum standards.[2] The Act also sets out a number of rules of the road which prescribe standards of conduct in relation to driving practice.[3] The driver who does not observe these standards may be prosecuted for an offence under the Act.

The second goal of the *Motor Vehicle Act* is to protect and assist the victims of road accidents. A driver involved in an accident is required to stop and render assistance[4] to an injured person. It is an offence for a driver to leave the scene of an accident.[5] All vehicles are required to carry certain minimum levels of third party liability insurance and provision is made for limited no-fault benefits.[6] The result is that, in most cases, persons injured in road accidents will be compensated.

To achieve these goals, the *Motor Vehicle Act* imposes duties on a variety of persons. These include the owners and operators of motor vehicles. Obviously, the owner and operator of a vehicle are frequently the same person. But sometimes they are not. What is the legal position of the owner of a vehicle driven by another person in a way which gives rise to civil liability, or which violates provincial law?

The answer to that question is the concern of six loosely related provisions of the *Motor Vehicle Act*, namely sections 76 to 81. It is these provisions which are the focus of this Report.[7] Broadly speaking, the aim of these provisions is to impose liability on the owner of a vehicle for wrongs or offences that are committed by the operator. Liability of this kind, which arises

1. R.S.B.C. 1979, c. 288.
2. *See, e.g.*, ss. 24, 24.1, 25 and 85.
3. Part 3, ss. 115 to 213.
4. S. 62.
5. *Ibid.*
6. S. 3; *see also* the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1979, c. 204.
7. The full text of ss. 76 to 81 is set out in Appendix A of this Report.

from the relationship between the owner and the wrongdoer, is commonly referred to as "vicarious liability."

The very concept of vicarious liability is one which many people have difficulty accepting. The notion that only blameworthy conduct should attract punishment or liability is deeply ingrained. The use of vicarious liability in the Act, therefore, raises a number of important issues. Is the imposition of vicarious liability the best way of attaining the goals of the legislation? What should the limits of liability be? What kinds of defences should be available to an owner liable for the acts of another? What kind of conduct, if any, should excuse him from liability? What sorts of persons should the notion of owner encompass? A consideration of these issues divides neatly into two parts. The first is the liability of the owner to compensate others for damage and injury caused by the operator (civil liability). The second is the liability of the owner to be punished for offences committed by the operator.[8]

This Report was preceded by a *Working Paper on Vicarious Liability Under the Motor Vehicle Act*, published by the Commission as a consultative document.[9] The Working Paper was distributed widely among persons having a special interest or expertise in this area and made available generally to the public. The response stimulated by the Working Paper, while not large, was of great assistance in developing our final recommendations.

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8. Appropriate terminology to describe the owner's liability for an offence committed by the operator is discussed in the following Chapter.
9. Law Reform Commission of British Columbia, *Working Paper on Vicarious Liability Under the Motor Vehicle Act* (WP 60) hereafter referred to as the Working Paper.

CHAPTER II

SECTIONS 76 TO 81 OF THE *MOTOR VEHICLE ACT*: AN OVERVIEW

A. Introduction

The general effect of sections 76 to 81 of the *Motor Vehicle Act* is to impose liability on a person for offences, or for loss or damage, arising from the use of his motor vehicle. As a general rule, liability will attach regardless of whether it is the owner, or some other person, who is operating the vehicle at the relevant time.

These provisions concern both civil liability and liability to be punished for an offence under the Act. Both types of liability may arise from a single incident. For example, an owner may loan his car to a friend who, while driving in a careless or reckless manner, hits and injures a pedestrian. Under section 79 of the *Motor Vehicle Act*, the owner is liable to pay damages to compensate the pedestrian for injuries sustained as a result of his friend's negligence. Under section 76, moreover, the owner may also be prosecuted for the friend's failure to drive with due care and attention, an offence created by section 149 of the Act.

B. Civil Liability

An owner's civil liability for loss or damage occasioned by another person's use of his motor vehicle arises under section 79 of the *Motor Vehicle Act*:[1]

> **79.** (1) In an action to recover loss or damage sustained by a person by reason of a motor vehicle on a highway, every person driving or operating the motor vehicle who is living with and as a member of the family of the owner of the motor vehicle, and every person driving or operating the motor vehicle who acquired possession of it with the consent, express or implied, of the owner of the motor vehicle, shall be deemed to be the agent or servant of that owner and employed as such, and shall be deemed to be driving and operating the motor vehicle in the course of his employment.
>
> (2) Nothing in this section relieves a person deemed to be the agent or servant of the owner and to be driving or operating the motor vehicle in the course of his employment from the liability for such loss or damage.

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1. This provision was first added to the Act in 1937. *See Motor-vehicle Act Amendment Act, 1937*, S.B.C. 1937, c. 54, s. 11.

On its face, this provision seems to be silent on the question of the owner's liability. It merely deems a person driving a motor vehicle with the owner's consent to be an employee of the owner and to be driving in the course of his employment. This legal fiction, however, is a potent one. It triggers a rule of the common law which makes an employer vicariously liable for any wrongs committed by an employee in the course of his employment. Therefore, where the owner of a motor vehicle permits another person to operate it, and that person wrongfully injures a third party, the owner is jointly liable, along with the driver, for damages. This liability arises even though the owner committed no wrongful act himself.

Subsection 79(3) qualifies the definition of "owner" in circumstances where a motor vehicle is purchased under a conditional sales agreement:

> **79.** (3) Where a motor vehicle has been sold, and is in possession of the purchaser under a contract of conditional sale whereby the title to the motor vehicle remains in the seller until the purchaser becomes the owner on full compliance with the contract, the purchaser shall be deemed an owner within the meaning of this section, but the seller or his assignee shall not be deemed an owner within the meaning of this section.

This provision ensures that, as between the conditional seller and the buyer, liability attaches to the buyer by deeming that he and not the seller is the "owner" of the motor vehicle for purposes of civil liability.

C. Penal Liability

1. Constitutional Issues

In Canada, only Parliament is competent to legislate with respect to criminal law.[2] The provinces, however, have certain limited powers with respect to criminal matters. These include the establishment of criminal courts[3] and policing. The prosecution of criminal offences is also, in practice, left to the provinces.[4]

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2. This jurisdiction arises under section 91(27) of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3, which authorizes Parliament to make laws in relation to:
   > The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
3. *Constitution Act, 1867, ibid.*, s. 92(14).
4. Certain prosecutorial powers also rest with the federal authorities, although the scope of these powers is unclear. *See A.-G. Can.* v. *Can. Nat. Transportation Ltd.*, [1983] 2 S.C.R. 206, (1983) 7 C.C.C. (3d) 449 (S.C.C.) and *R.* v. *Wetmore*, [1983] 2 S.C.R. 284, (1983) 7 C.C.C. (3d) 507 (S.C.C.).

Another significant head of power is section 92(15) of the *Constitution Act, 1867*. This provision allows the provinces to provide penalties in order to enforce constitutionally valid provincial laws.[5] The competence of the provinces to impose punishment is, therefore, limited to matters over which they have legislative jurisdiction.[6]

The regulation of highway traffic is generally regarded as a matter falling within the competence of the provinces.[7] The provinces may, therefore, provide penal sanctions for the contravention of provincial motor vehicle legislation. In British Columbia, a person who violates a provision of the *Motor Vehicle Act* commits an offence.[8] Under the *Offence Act*, provincial offences are punishable on summary conviction, carrying a maximum penalty of a $2,000 fine, six months imprisonment, or both unless the enactment that creates the offence provides for a different penalty.[9]

The relationship between federal and provincial powers in this area can raise difficult questions. Sometimes a provincially created offence appears to relate to a "true" criminal matter on which only the federal government ought to legislate:[10]

> [T]he distinction between a valid provincial law with an ancillary penalty and a provincial law which is invalid as being in pith and substance a criminal law naturally raises - from the provincial point of view - the question...of the definition of "criminal law"; the absence of a satisfactory answer has created uncertainty about the scope of provincial power under s. 92(15) as well as the scope of federal power under s. 91(27).

As a general observation, the courts have tended to uphold the validity of provincially created offences.[11] Indeed, in recent cases, provincial laws which virtually duplicate offences arising under the *Criminal Code* have been held to be valid.[12] For ex-

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5. The provinces are competent to legislate in respect of matters relating to:
   The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
6. The primary heads of provincial powers are listed in s. 92 of the *Constitution Act, 1867*, *supra*, n. 3.
7. *Provincial Secretary of P.E.I.* v. *Egan*, [1941] S.C.R. 396. The decision, however, is unclear as to the appropriate head of provincial power.
8. S. 69 of the *Motor Vehicle Act* states:
   69. A person who contravenes a section of this Act by doing an act that it forbids, or omitting to do an act that it requires to be done, commits an offence.
9. *Offence Act*, R.S.B.C. 1979, c. 305, ss. 2, 4.
10. Hogg, *Constitutional Law of Canada* (2nd ed., 1985) 418.
11. *See, e.g.*, *O'Grady* v. *Sparling*, [1960] S.C.R. 804; *Mann* v. *The Queen*, [1966] S.C.R. 238; *Stephens* v. *The Queen*, [1960] S.C.R. 823; *Smith* v. *The Queen*, [1960] S.C.R. 776; *R.* v. *Hurst*, (1984) 57 B.C.L.R. 313 (S.C.).
12. *Ibid.*

ample, the *Motor Vehicle Act* creates the offences of careless driving,[13] failure to stop at the scene of an accident[14] and driving with a blood-alcohol level exceeding .08.[15] These are almost identical to certain offences contained in the *Criminal Code*: dangerous driving,[16] failure to stop at the scene of an accident,[17] and a similar ".08 offence."[18] The case law suggests that some degree of overlapping is permissible.

Provincial legislation creating an offence will be invalid only to the extent that it conflicts with a similar federal law.[19] As a general rule, if the provincial law can be obeyed without contradicting the federal law, there is no conflict.[20] The practical result, as Professor Hogg notes,[21] is a concurrence of federal and provincial legislative power over some of the area loosely regarded as criminal law.

2. TERMINOLOGY

A problem we have encountered in this study has been to find an appropriate term to refer to a violation of provincial legislation which attracts a punishment provided for under provincial law. "Criminal" is inaccurate, having regard to the distribution of powers under the Canadian constitution. "Quasi-criminal" is closer to the mark, but it does not bear repeated usage without annoying the reader. We have settled on "penal" as the pivotal adjective to denote liability to punishment for the violation of a provincial enactment.

The use of "criminal" cannot, however, be avoided entirely. In this Report it is used in two different senses. First, we use it in the constitutionally correct fashion to refer to "true crimes" which are the proper concern of the Parliament of Canada. Second, we use it in a generic sense to refer to the general body of law that is concerned with prohibited conduct and its punishment.

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13. S. 149.
14. S. 62.
15. S. 220.1.
16. *Criminal Code*, R.S.C. 1985, c. C-46, s. 249(4).
17. *Ibid.*, s. 249(2).
18. *Ibid.*, s. 253.
19. Under the doctrine of paramountcy, an inconsistency between a federal and provincial law renders the provincial law inoperative: *see* Hogg, *supra*, n. 10 at 353-5.
20. *R.* v. *Hurst*, *supra*, n. 11 at 318. *See also Multiple Access Ltd.* v. *McCutcheon*, [1982] 2 S.C.R. 161. It is important to note that proceedings in a particular case may be commenced either under the federal or provincial law, but not both.
21. *Supra*, n. 10 at 419.

3. SECTION 76 OF THE MOTOR VEHICLE ACT

An owner's penal liability for violations of the *Motor Vehicle Act* arises primarily under subsection 76(1):

> **76.** (1) The owner of a motor vehicle shall be held liable for any violation of this Act or the regulations, the *Highway Act* or the regulations under it, or the *Firearm Act* in respect of the carrying or use of firearms in motor vehicles, or the traffic bylaws of a municipality.

This provision can be traced back to motor vehicle legislation first enacted in 1911.[22] Its effect is to render an owner liable for violations of the *Motor Vehicle Act* committed by a person to whom the owner has entrusted his motor vehicle. An owner, consequently, may be liable to a fine or imprisonment where another person's conduct amounts to an offence under the Act.

A number of further subsections qualify the effect of subsection (1):

> (1.1) No owner shall be held liable under subsection (1) where he establishes that
>
> (a) the person who was, at the time of the violation, in possession of the motor vehicle was not entrusted by the owner with possession, or
>
> (b) the owner exercised reasonable care and diligence when he entrusted the motor vehicle to the person who was, at the time of the violation, in possession of the motor vehicle.
>
> (1.2) Where an owner is liable under this section, in place of the fine or term of imprisonment specified in an enactment for the offence, a fine of not more than $2000 or imprisonment for not more than 6 months or both may be imposed.
>
> (2) On a prosecution of the owner of a motor vehicle for an offence under this section, the burden is on the defendant to prove that
>
> (a) the person in possession of the motor vehicle was not a person entrusted by the owner with possession; or
>
> (b) the registered owner is not the owner.
>
> (3) An owner of a motor vehicle is liable under subsection (1) notwithstanding that the motor vehicle, at the time of the violation, is unattended or is not in the possession of any person.

Subsections (1.1) and (1.2) were added to section 76 after our Working Paper was distributed for comment.[23] They came into force on Sept. 2, 1988.[24]

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22. *Motor-traffic Regulation Act, 1911*, S.B.C. 1911, c. 36, s. 33.
23. *Transportation and Highways Statutes Amendment Act, 1988*, S.B.C. 1988, c. 62, s. 10.
24. B.C. Reg. 359/88.

Paragraph (a) of subsection (1.1) cures an anomaly which previously existed. Subsection (2) had been something of a curiosity. It placed a burden of proof on the owner to show that he did not entrust the vehicle to the person in possession of it, without expressly providing a defence to the charge if the burden was met. Subsection (1.1)(a) now provides such a defence. Paragraph (b) of subsection (1.1) provides a defence to the owner where he has exercised proper care in entrusting his vehicle to another. This provision is discussed in greater detail in Chapter IV of this Report.

Subsection (1.2) provides a "cap" on the owner's liability for violations by the operator of a motor vehicle. This might prove beneficial in the few cases where the Act imposes a penalty on the operator which is potentially higher than that specified in subsection (1.2).[25] On the other hand, it may also subject the owner to a disproportionate liability where the penalty imposed on the operator for a particular offence is relatively small. For example, the driver who fails to wear his seatbelt is liable to a fine of $100.[26] The vicariously liable owner would, by virtue of subsection (1.2), appear to be liable to a fine of $2000 and 6 months imprisonment for the same incident.

The concept of ownership arises in section 76 in two places. In subsection (2) a distinction is drawn between the "owner" and the "registered owner" of a vehicle although the significance of the distinction is not made clear. Subsection 76(4) enlarges on the definition of "owner":

> (4) In this section "owner" includes a person in possession of a motor vehicle under a contract by which he may become the owner on full compliance with the contract, and in whose name alone the motor vehicle is registered.

According to this provision, the purchaser of a motor vehicle under a conditional sales agreement would be regarded as an owner for the purposes of penal liability. This is similar to subsection 79(3). Section 76(4), however, does not exclude the vendor of the motor vehicle from the definition of owner. A person who sells a vehicle and retains title to it under the arrangement may be liable for offences committed by a person driving the vehicle.

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25. *See, e.g.*, s. 88(1)(d).
26. S. 217.

4. Other Provisions

There are a number of ancillary provisions contained in the *Motor Vehicle Act* which are loosely related to an owner's liability arising from another person's use of a motor vehicle. Section 77 provides that:

> **77.** (1) Where a peace officer has reason to believe that a motor vehicle has been involved in an accident or in the violation of this Act, the *Commercial Transport Act* or the *Highway Act*, the regulations under any of these Acts or the bylaws of a municipality, and so informs the owner or a person in the motor vehicle, it is the duty of the owner or person, as the case may be, if required by the peace officer, to give all information it is in his power to give relating to the identification of the driver of the motor vehicle at the relevant time or during the relevant period.
>
> (2) If the owner or other person fails to comply with subsection (1), or gives information which he knows to be false or does not believe to be true, he commits an offence against this Act.

This section places a duty on the owner to disclose the identity of the driver of the motor vehicle to police in certain circumstances and imposes a penalty for its breach. The section, first enacted in 1968,[27] was no doubt intended to assist authorities in enforcing the law against the actual wrongdoer.

Section 78, first enacted in 1957,[28] imposes liability on the owner who has actual control or possession of his motor vehicle but who loans it to an unlicensed minor:

> **78.** Every person who, being in possession or control of a motor vehicle, permits it to be driven or operated by a minor who is not the holder of a subsisting driver's licence permitting that operation commits an offence against this Act.

Section 80 is a curious provision. It refers to the liability of members of a licensed partnership:

> **80.** Each member of a licensed partnership is liable to the penalties imposed against licensees for breach of this Act.

The provision dates back to the original legislation of 1911.[29] It has not been the subject of judicial consideration since its inception and its effect today is unclear. One possibility is that it was meant to apply to persons engaged in selling or im-

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27. S.B.C. 1968, c. 32, s. 9.
28. S.B.C. 1957, c. 39, s. 71.
29. *Supra* n. 22. Section 45 of that Act provided:
    > **45.** For the purposes of the consequences of any conviction under this Act, a conviction against any person who is a member of a licensed partnership, whether made while he is a member of such partnership or prior thereto, shall have the same effect as if such conviction had been against each member of the said partnership.

porting motor vehicles.[30] On the other hand "partnership" may simply have been intended by the drafter to refer to situations where a vehicle was co-owned by two or more individuals.

Finally, the Act contains section 81 which refers to the liability of an owner for offences relating to the equipment or maintenance of his vehicle:

> 81. (1) The registered owner of a motor vehicle by means of or in respect of which motor vehicle an offence against this Act or the regulations with respect to the equipment or maintenance of the vehicle is committed by his employee, servant, agent or worker, or by any person entrusted by him with the possession of the motor vehicle, shall be deemed to be a party to the offence so committed, and is personally liable to the penalties prescribed for the offence as a principal offender.
>
> (2) Nothing in this section relieves the person who actually committed the offence from liability for it.
>
> (3) On every prosecution of a registered owner of a motor vehicle for an offence against this Act or regulations that has been committed by means of or in respect of that motor vehicle, the burden of proving that the offence was not committed by him and that the person committing the offence was not his employee, servant, agent or worker, or a person entrusted by him with the possession of the motor vehicle is on the defendant.

This provision can also be traced back to the legislation of 1911.[31] It makes the owner liable for failure to comply with standards regarding the equipment and maintenance of his vehicle. Where that failure is the fault of the owner's employee, servant, agent or worker, or a third party in possession of the vehicle with the owner's consent, the owner is liable along with the perpetrator. This provision overlaps section 76.

D. Conclusion

As a group, sections 76 to 81 of the *Motor Vehicle Act* might be regarded as loosely related by the underlying theme of an owner's liability for the acts of another person, otherwise known as vicarious liability. Individually, however, the provisions seem to exist in isolation from each other. They were enacted at differ-

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30. Such persons were not regarded, and this remains true today, as owners in the conventional sense. They did not have to apply for licencing or registration in respect of each motor vehicle in their possession. Rather, they were regarded as motor dealers and were issued a trade licence, known today as a demonstration licence. The provision may have been intended to ensure that these licenced motor dealers were accountable in the same way as other owners. If this is true, however, it is curious that the provision is restricted to partnerships.

31. *Supra*, n. 22, s. 46. The original section, however, applied to all offences against the Act, not just those concerning equipment and maintenance of a vehicle.

ent times, each as an apparently *ad hoc* response to a particular concern and seemingly without regard to similar provisions already in effect. As a result, certain provisions are redundant. The function of others, such as section 80, is obscure.

A number of instances in which the scope and operation of these provisions is not harmonious can also be identified. In sections 76 and 79, for example, a symmetry between vicarious penal and civil liability might be expected to exist. But they are inconsistently drafted and the concept of owner is subject to subtle, but important, variations in meaning.

These provisions are also inconsistent regarding their links with legislation other than the *Motor Vehicle Act*. Section 76 provides that the owner is also vicariously liable for offences arising under the *Highway Act* and the *Firearm Act*. Section 77 imposes its duty of disclosure on the owner with respect to offences under the *Highway Act* and the *Commercial Transport Act*. Why two provisions which concern the same basic subject matter should vary in this way is not obvious.

So far as we are aware, these provisions have never been the subject of a systematic review. For this reason alone, an examination may be called for. However, the enactment of the *Charter of Rights and Freedoms*[32] has added a new dimension to the issue of vicarious liability in the penal context. A number of conflicting Canadian decisions in this regard make a fresh consideration especially desirable at this time.

32. *Constitution Act, 1982*, ss. 1 to 34 (Part I).

A. Section 79: Underlying Policy

Section 79 triggers a rule of law respecting vicarious liability. This ensures that an owner who entrusts his car to another person will be liable for any damages arising out of the negligent operation of the vehicle. The provision reflects a long-standing public concern that persons who engage in an inherently dangerous activity, such as the operation of a motor vehicle, should be financially responsible for damage they may cause to themselves or others. From a modest beginning in 1937, when the precursor to section 79 was first enacted, legislative intervention has proceeded to the point of creating a regime of universal compulsory third party liability insurance with certain no-fault benefits attached.[1]

The original policy underlying section 79 appears to have been to increase the chances that a person injured in a motor vehicle accident would be compensated. The section diminishes the possibility that an injured person will fail to find a solvent defendant against whom he can successfully assert a claim for damages. By allowing recourse against two persons, both the owner and the driver, instead of one, the legislation placed the injured party in a more favourable position. In 1937, the owner of a motor vehicle was somewhat more likely than a non-owner to be both a person of substance and insured, and therefore able to satisfy a claim for damages. Moreover, a provision such as section 79 could also be expected to have the salutary effect of making an owner much more cautious in allowing his motor vehicle to be operated by others, since entrusting an irresponsible person could involve the owner in substantial liability.

The role of section 79 has become somewhat different since the advent of compulsory automobile insurance. Today, the result of section 79 is that an owner's insurer compensates parties injured as a result of the negligent operation of the owner's motor vehicle. Whether vicarious liability is necessary to achieve this purpose might seem open to question. However, the concept remains significant in two respects: for indemnification and for recovery outside the scope of insurance coverage.

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1. *See* the *Insurance (Motor Vehicle) Act*, R.S.B.C. 1979, c. 204.

Compulsory automobile insurance operates on principles of indemnity.[2] For this reason, it is still necessary that the owner of a motor vehicle be held liable before an insurer can be called upon to compensate a third party. Section 79 consequently retains its importance as a theoretical link in seeing that the claims of injured persons are properly satisfied.

Where a claim for damages, or the circumstances giving rise to it, falls outside the scope of insurance coverage, the owner must make compensation from his own pocket. In this situation, section 79 still operates to visit liability directly on the owner. This might occur, for example, where a victim recovers damages in excess of the amount covered by the owner's insurance policy. Similarly, the vehicle might be used for purposes or in a manner which constitutes a breach of the insurance agreement. In these cases, section 79 ensures that the owner is liable for any deficiency in, or the full amount of, damages notwithstanding that the owner may not personally have engaged in any culpable conduct.

As a general observation, there is nothing offensive in this result. It is the owner who decides who will or will not operate his motor vehicle. He decides the nature and extent of the insurance that is to cover its operation. He is in a position to set down rules as to where, when and how it will be operated. This analysis, however, breaks down if the owner is not in a position to exercise effective supervision and control over the use of a motor vehicle. It is important, therefore, that the concept of ownership employed in subsection 79(1) should embrace in some way the notion of effective supervision and control.

B. The Meaning of "Owner"

1. Ownership Generally Under The Motor Vehicle Act

Apart from the meaning which the term has acquired at common law, there are several definitions of "owner" contained in the *Motor Vehicle Act*. A starting point is section 1 which sets out the following general definition:

2. *See infra*, n. 7.

"Owner" includes a person in possession of a motor vehicle under a contract by which he may become its owner on full compliance with the contract.

Section 115 also provides a definition of owner applicable under Part 3 of the Act, which deals with the rules of the road:

"Owner" as applied to a vehicle means

(a) the person who holds the legal title to the vehicle;

(b) a person who is a conditional vendee, a lessee or mortgagor, and is entitled to be and is in possession of the vehicle; or

(c) the person in whose name the vehicle is registered.

For the purpose of vicarious civil liability, the definition of owner is further refined by the provisions of section 79(3). As explained in Chapter II it tells us that "owner" includes a conditional buyer but does not include a conditional seller.

These definitions may result in some confusion. For example, a vendor under a conditional sales agreement may or may not be an owner for general purposes under the Act. The definition in section 1 is of an inclusive nature. It takes whatever general meaning "owner" may have at common law and merely adds to it the buyer under a conditional sale agreement. Section 115, on the other hand, is an exclusive definition. For the purposes of the rules of the road, "owner" seems to cover both a purchaser and a vendor under a conditional sale agreement. For purposes of civil liability under section 79, however, only the purchaser, and not the vendor, is to be considered the owner.[3]

It is important to remember that section 79(3) does not provide a self-contained definition of "owner." It merely states who is, and who is not, to be regarded as an owner in a particular circumstance. Apart from that circumstance (the purchase of a motor vehicle under a conditional sale agreement) the more general statutory definition and common law meaning of "owner" apply.

2. The Effect Of The Cases

The courts have added a gloss of their own to the ownership provisions of motor vehicle legislation. Most of the earlier cases on this question draw a distinction between "technical" owner-

3. Whether this is also the case with respect to penal liability under s. 76 is questionable.

ship of a motor vehicle and "true" ownership. The latter term is variously referred to as "actual," "real," "common law" or "beneficial" ownership. A person who is the registered owner is the technical owner. However, he may not necessarily be the true owner. This depends on whether he also exercises possession and control of the vehicle. In one case the position was described as follows:[4]

> [T]he "owner" for purposes of vicarious liability means the real or actual owner, i.e., the person having domination over and control of the vehicle, and such owner is not necessarily the registered owner....

Registration, consequently, is viewed as creating only a presumption of ownership, rebuttable by evidence that dominion and control is exercised by someone other than the registered owner. If this is the case, then the person having possession, and not the registered owner, may be regarded as the true owner under the Act.

Recent cases have tended to obscure the distinction between technical and true ownership. Instead the courts have found that the registered and common law owners are co-owners of the vehicle. There is now substantial authority for the view that, in certain circumstances, there may be two owners of a motor vehicle, both of whom can be held vicariously liable for the negligence of a driver operating the vehicle with their consent.

An example is *Larocque* v. *Lutz*[5] where a vehicle was registered in the name of a father, but in the constant control of his son. The son was paying the purchase price of the vehicle and was presumed to be the owner by both himself and the father. Both were held to be owners and so were vicariously liable for damage caused by a third party who was operating the vehicle.

In another case[6] a purchaser under a conditional sale agreement was a purchaser in name only. A third party retained actual possession and control of the car. The court held that for purposes of civil liability, there were two owners: the conditional sales purchaser (by operation of subsection 79(3)), and the third party (according to the standards developed at common law).

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4. *Singh* v. *McRae*, [1971] 5 W.W.R. 544, 547 (B.C.S.C.). *See also Wynne* v. *Dalby*, (1913) 30 O.L.R. 67 (C.A.); *Meason and Glacier* v. *Michael and Elwood*, (1959) 27 W.W.R. 605 (Sask. C.A.); *Crissall* v. *Burton and Basi*, (1953) 8 W.W.R. 409 (B.C.S.C.); *Haberl* v. *Richardson and Richardson*, [1951] O.R. 302 (C.A.).
5. *Larocque* v. *Lutz*, (1979) 16 B.C.L.R. 348 (S.C.), *aff'd*, (1981) 27 B.C.L.R. 357 (C.A.).
6. *Wagenstein* v. *Graham*, (1954) 13 W.W.R. 392 (B.C.C.A.).

C. Reform

1. Vicarious Civil Liability Generally

In the context of civil liability, we believe that vicarious liability has a useful role to play in the appropriate distribution of losses arising out of road accidents. While compulsory auto insurance has made the vicarious liability of the vehicle owner something of a legal fiction, it still plays a valuable conceptual role so long as the insurance is based on indemnity principles.[7] If that basis should change it might then become appropriate to reconsider the basic policy of section 79.

2. Who Is An "Owner"?

In the vast majority of road accidents in this province, exactly who the owner is, for the purpose of fixing liability, is irrelevant. Every vehicle will have an owner and, given a single insurer with a monopoly over the provision of vehicle insurance, there is little doubt out of which pocket compensation will actually be paid.

There are, however, a few situations in which the question of ownership may determine "who pays." Two were noted earlier. The first is where the insurance coverage purchased by the owner is less than the damages incurred. Another is where the conduct giving rise to the claim falls outside the scope of coverage.[8] Ownership may also have significance where an out-of-province vehicle is involved in an accident.

Because these situations exist it is important that section 79 operate fairly. By this we mean that vicarious liability should only be imposed on those "owners" who are in a position to exercise effective supervision and control over the motor vehicle. These are the only persons who, through appropriate conduct, can guard against liability. If section 79 simply imposed liability on owners, leaving the question of ownership to be determined with reference to the holder of legal title, it would operate unfair-

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7. Technically, the insurer's obligation is not to an injured third party but to the insured party. The obligation is to indemnify the insured -- make him whole by replacing money he had paid out to compensate the injured party. That is the theory. The reality is that the insurer plays an active role dealing with the injured party and usually compensates him directly.

8. An example put to the Commission was the use of a truck to transport explosives, an activity prohibited by the insurance policy. If the truck were leased, the lessor could, without fault, find himself liable for damages arising out of the lessee's negligence.

ly in this sense by sweeping in a number of "owners" who could not exercise effective supervision and control.

Section 79(3) goes some way in avoiding this potential unfairness. It tells us that the conditional vendor of a vehicle, or his assignee, is not the owner for purposes of civil liability. This provision is aimed at a legal technicality respecting ownership of goods. The owner is not always the person who has the care, custody and use of goods on a day-to-day basis. Retaining or taking the legal title to goods is frequently used by credit grantors to obtain a security interest. The conditional sale referred to in subsection (3) is the paradigm of such arrangements. Under a conditional sale agreement, the buyer does not become full owner of the goods until he has satisfied his contractual obligations, usually the payment of the full purchase price. When that happens, he then obtains the legal title and becomes the full owner of the goods.

Under a conditional sale the seller, although technically the owner of the goods, is primarily a credit grantor whose operations and concerns are far removed from how the goods are dealt with on a day-to-day basis. Section 79 rightly recognizes that it would be unfair to treat a credit grantor such as a conditional seller as an owner, for the purposes of that section, and expose him to risks which he has no practical way of avoiding. Subsection (3) expressly states that such a vendor is not the owner. This is an eminently sensible measure.

3. Vehicle Leasing

There is a further class of credit grantors who take security through a retention-of-legal-title type of security device and who are, therefore, owners within the meaning of section 79(1). A type of financing arrangement which has become common in recent years is the long-term leasing of equipment such as motor vehicles. On expiration of the lease, the lessee may or may not have the opportunity to become the owner, depending on the terms of the agreement.

The case law[9] seems clear that a person engaged in the business of renting vehicles on a short term basis is civilly liable, as

9. *Thompson* v. *Bourchier*, [1933] 3 D.L.R. 119 (Ont. C.A.); *Child* v. *Vancouver Motors U-Drive Ltd.*, [1941] 1 D.L.R. 75 (B.C.S.C.); *McGrogan* v. *Hertz Drivurself Stations*, [1942] 1 D.L.R. 564 (Ont. H.C.); *Terry* v. *Vancouver Motors U-Drive Ltd.*, [1942] 1 D.L.R. 407 (B.C.C.A.); *Wellman* v. *Car-U-Drive*, [1953] 1 D.L.R. 643 (Ont. H.C.).

owner, for damage arising out of the operation of a vehicle by its renter. A similar liability is also imposed on persons ("lessors") who lease vehicles to others on a long term basis.[10]

So far as the latter group is concerned, this result is questionable. Long term equipment leases usually serve a security function and the reasons which justify the exclusion of conditional sellers from the operation of section 79(1) would seem to apply with equal force to lessors in these circumstances. We favour their exclusion from vicarious liability.[11]

The task, therefore, is to distinguish between those lease arrangements which ought to be treated like conditional sales agreements and excluded from section 79, and those which should not. One approach is to identify leases which, in substance, serve a security or a financing function and exclude those. But that is easier said than done. Attempting to do so raises a problem which has troubled the law respecting secured transactions for many years.[12] Some of the difficulties were discussed in our *Report on Personal Property Security*.[13]

A relatively primitive test to distinguish such leases is found in the *Sale of Goods on Condition Act*.[14] If a lease of goods gives the lessee an option to purchase them at the end of the term, the lease is deemed to be a conditional sale for the purposes of that Act. This test has two defects. First, the parties will often have an "understanding" on this question which is left undocumented to avoid the application of the Act. Second, what happens to the goods at the end of the term of the lease may be irrelevant. If the useful life of the goods coincides with the term of the lease, it may be a matter of indifference to the parties who gets whatever remains of the goods at the end of the term.

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10. *Rudd* v. *Rudd's Heavy Equipment Repairs Ltd.*, (1984) 44 R.F.L. (2d) 100 (B.C.S.C.). In this case, the defendant company, which leased a car to the plaintiff's husband, was held liable for damages to the plaintiff occasioned when the lessee was driving. *See also Huddleston* v. *Ramzan*, [1988] 5 W.W.R. 600 (B.C.S.C.) where the lease contained an option to purchase which had not yet been exercised. While the option might cause the lease to be regarded as a conditional sale within the meaning of the *Sale of Goods on Condition Act*, R.S.B.C. 1979, c. 373, s. 1, it did not bring it within the conditional sale exemption provided in s. 79(3) of the *Motor Vehicle Act*.

11. In the Working Paper we raised the question whether any case existed for also exempting from vicarious liability owners who hire out their vehicles on a short term rental basis. No comment was received on this issue.

12. This has been an enormously difficult question in the context of the Uniform Commercial Code and under those Canadian Personal Property Security Acts which follow it. For an examination of this problem in a Canadian context, *see* Cuming, "True Leases and Security Leases under Canadian Personal Property Security Acts," (1982/83) 7 Can. Bus. L. J. 251.

13. *Report on Personal Property Security* (LRC 23, 1975) 27-32.

14. *Supra*, n. 10.

A more recent trend is to characterize all long-term leases as security agreements, for the purposes of third party rights. The draft *Personal Property Security Act*, recently circulated for comment by the Ministry of Finance and Corporate Relations, deems all leases for a term of more than one year to be security agreements. This general approach is one which commends itself to us for the purposes of section 79 of the *Motor Vehicle Act*. It is our view that where a motor vehicle has been leased for a length of time exceeding some stipulated period, then the lessee, and not the lessor, should be regarded as the owner under section 79.

4. RECOMMENDATION

What is an appropriate period of time? One option is to follow the pattern of personal property security legislation and use one year as the cut-off. An alternative arises out of what we understand to be the practice in the Motor Vehicle Registry of British Columbia: in all cases where leased vehicles are involved, the lessor is recorded as the registered owner of the vehicle. Where, however, the lease is other than a short term rental, the name of the lessee is also recorded, although this recording is for information purposes only. The name of the lessee will be recorded where the lease is for a period exceeding 60 days. Anything less is considered a short term rental.[15]

Any period of time selected will necessarily be arbitrary, but, having regard to the reasons for insulating the lessor/ financer from liability under section 79, a period of 60 days rather than one year seems to us to strike an appropriate balance on this question.

It is our conclusion that the policy of section 79(3) of the *Motor Vehicle Act* is to insulate from civil liability the person who, although he might technically be an owner, is really engaged in a financing transaction. For this reason, the long term lessor of a motor vehicle should be treated in the same way as the vendor under a conditional sale agreement.

The Commission recommends that:

1. Section 79(3) of the Motor Vehicle Act *be repealed and replaced by provisions comparable to the following:*

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15. Information confirmed by Geoff R. Amy, Manager, Vehicle Licences Branch by telephone Nov. 9, 1988.

79. (3) For the purposes of this section, "owner" includes a person who is in possession of a motor vehicle as

(a) the purchaser under a contract by which he may become its owner on full compliance with the contract; and

(b) the lessee under a lease for a term of 60 days or more

(4) For the purposes of this section, "owner" does not include the seller, or lessor in a transaction described in subsection (3).

CHAPTER IV PENAL LIABILITY

A. Introduction

Section 76(1) of the *Motor Vehicle Act* makes an owner vicariously liable for motor vehicle related offences arising under provincial legislation.

> **76.** (1) The owner of a motor vehicle shall be held liable for any violation of this Act or the regulations, the *Highway Act* or the regulations under it, or the *Firearm Act* in respect of the carrying or use of firearms in motor vehicles, or the traffic by-laws of a municipality.

Violations of the Acts[1] referred to in this provision are offences punishable on summary conviction[2] and the owner's conviction may result in a fine of up to $2,000 or imprisonment for up to six months or both.[3]

Conceivably, under section 76, the owner of a motor vehicle may be imprisoned for an offence committed without his knowledge by another person. This consequence, on its face, is inconsistent with a long-standing principle of law that criminal culpability should attach only to personal blameworthiness.[4]

The common law, however, has departed from this principle in certain circumstances, usually to make an employer or principal liable for an offence committed by his employee or agent.[5] The principle has been further eroded by modern legislation, such as section 76 of the *Motor Vehicle Act*, which imposes vicarious liability for conduct of a particular nature. As a general rule, these exceptions have been dictated by policy considerations and have been restricted to offences of a regulatory nature. Such infractions are sometimes referred to as "quasi-criminal" offences.

At this point, it is useful to review the development of vicarious liability for offences at common law and the policies motivating this development. The discussion which follows is

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1. Under the *Firearm Act*, R.S.B.C. 1979, c. 134, s. 12 it is an offence to carry a firearm containing live ammunition in a motor vehicle unless authorized by regulations or a permit. Offences arising under the *Highway Act*, R.S.B.C. 1979, c. 167, relate generally to the obstruction of, or interference with, highway traffic.
2. *Offence Act*, R.S.B.C. 1979, c. 305, s. 2.
3. *Motor Vehicle Act*, s. 76(1.2).
4. Sayre, "Criminal Responsibility for the Acts of Another," (1930) 43 Harv. L. Rev. 689, 717.
5. *See* discussion *infra*.

intended as a brief overview, addressing issues of policy at a general level only.

B. Vicarious Liability for Offences at Common Law

1. The General Rule

Apart from legislation expressly imposing liability, the issue of vicarious liability for offences has arisen without exception only in the context of employer/employee and principal/agent relationships. As a general proposition, an employer is not criminally responsible for the offences of his employee, even those committed in the course of his employment, unless the employer has authorized or ordered the offending act.[6] It was established as early as 1730 that the concept of vicarious liability in tort had no application in the field of criminal law:[7]

> It is a point not to be disputed, but that in criminal cases the principal is not answerable for the act of the deputy, as he is in civil cases: they must each answer for their own acts, and stand or fall by their own behaviour. All the authors that treat of criminal proceedings, proceed on the foundation of this distinction; that to affect the superior by the act of the deputy, there must be the command of the superior.

2. Early Common Law Exceptions

Two exceptions to the general rule arose at common law. The first related to public nuisance. An employer could be prosecuted for a nuisance created in the ordinary course of his employee's employment, even where the employer was ignorant of the nuisance or had expressly forbidden it.[8] This exception was said to be justified because of the essentially civil nature of such an offence. Its object was not so much to punish the perpetrator as to prevent the nuisance from recurring.[9] The prosecution of this offence consequently became subject to the principles governing civil cases.[10]

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6. In the latter case, the master would be liable as a party to the offence under section 22 of the *Criminal Code* (as a person counselling an offence).
7. *R.* v. *Huggins*, (1730) 2 Str. 883, 885, 93 E.R. 915, 917.
8. *E.g.*, *R.* v. *Medley*, (1834) Car. & P. 292, 172 E.R. 1246; *R.* v. *Stephens*, (1866) L.R. 1 Q.B. 702.
9. *R.* v. *Stephens*, *ibid.*, at 708-9. The exception was also influenced by the fact that civilly, nuisance was a tort of strict liability: *see Wringe* v. *Cohen*, [1940] 1 K.B. 229. *See also Clerk & Lindsell on Torts* (13th ed., 1969) para. 1412.
10. *Ibid.*, at 710.

The second exception concerned criminal libel. In early English law, the proprietor of a newspaper was held criminally responsible for the publication of any libel, notwithstanding his complete ignorance of the offending material. Liability attached as a result of an irrebuttable presumption that the proprietor had actually authorized the publication.[11] This exception has been rationalized by some commentators on the basis of expediency:[12]

In the case of a newspaper libel, it is peculiarly difficult to prove the fact that the owner of the paper expressly authorized or had knowledge of the publication of the libel; [in these cases] expediency creates strong pressure to relax the ordinary principles of liability.

C. Vicarious Liability for Statutory Offences

1. Background

The exceptions to the general rule at common law have, in recent times, been extended to the modern phenomenon of regulatory offences. Owing to the essentially civil nature of these offences, the courts have tended to disregard individual blameworthiness for the sake of regulating public order.[13] This expansion of criminal liability has been compared to the development of vicarious liability in tort by reason of commercial necessity:[14]

> Just as during the eighteenth and nineteenth centuries the growth of industry and the consequent vast increase of business carried on by agents and subordinates necessitated new adjustments in the law of civil liability to meet intensified commercial needs, resulting in a doctrine of respondeat superior attaching civil liability to a responsible superior even though no authorization or knowledge on his part could be proved, so today when the sphere of criminal administration is being extended into commercial fields and widened to include many regulatory and essentially non-criminal matters, such as violations of the pure food laws, the building laws, traffic ordinances, child labor laws, and the like, a similar commercial

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11. *R.* v. *Gutch, Fisher and Alexander*, (1829) M. & M. 433, 173 E.R. 1214. The law in this regard was subsequently modified by legislation, which absolved a proprietor of liability if he proved that the publication was made without his authority, consent or knowledge and that it did not arise from want of his due care or caution: *Libel Act, 1843*, 6 & 7 Vict., c. 96, s. 7.
12. Sayre, *supra*, n. 4 at 710.
13. *Ibid.*, at 719-20.
14. *Ibid.*, at 716.

pressure is making itself felt in the administration of the criminal law.

2. General Application Of The Doctrine

Vicarious liability in relation to statutory offences arises more frequently through the process of judicial interpretation than through the work of Parliament. It is uncommon for legislation to expressly impose upon a person liability for the actions of another.[15] As a general proposition, the courts are loathe to interpret a statute as giving rise to vicarious liability. They will do so only where this is consistent with the intended object of the legislation:[16]

> Prima facie, then a master is not to be made criminally responsible for the acts of his servant to which the master is not a party. But it may be the intention of the Legislature, in order to guard against the happening of the forbidden thing, to impose a liability upon a principal, even though he does not know of, and is not party to, the forbidden act....To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed.

Ordinarily, courts will infer such an intention only in cases involving regulatory offences, where the prohibited act is attributable equally to the employer and the employee,[17] and only where the absence of such an inference would render the effect of the legislation nugatory.[18]

3. Limitations On The Application Of The Doctrine

The extent to which courts will impose liability for a regulatory offence depends generally on the nature of the offence.[19] If it is one requiring intent, then the employer is

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15. Smith and Hogan, *Criminal Law* (5th ed., 1983) 148-49. A provision like s. 76(1) of the *Motor Vehicle Act* would seem exceptional in this regard, although it has a counterpart in the motor vehicle legislation of virtually all the Canadian provinces.
16. *Mousell Brothers* v. *London and North-Western Ry.*, [1917] 2 K.B. 836, 844-45.
17. Such acts include selling (*Coppen* v. *Moore (No. 2)*, [1898] 2 Q.B. 306); keeping (*Strutt* v. *Clift*, [1911] 1 K.B. 1); using (*Green* v. *Burnett*, [1955] 1 Q.B. 78); possessing (*Melias Ltd.* v. *Preston*, [1957] 2 Q.B. 380). Professor Glanville Williams suggests that in these cases, the courts have, in effect, compiled a new judicial dictionary: "Mens Rea and Vicarious Responsibility," (1956) Current Legal Problems 57.
18. *Mullins* v. *Collins*, (1874) L.R. 9 Q.B. 292; *Coppen* v. *Moore (No. 2)*, *ibid.* For example, legislation may be framed in such a way as to impose liability on the master only. It may be an offence for a licencee to serve alcoholic beverages to minors. If a servant commits the offence, he is not liable since the servant is not the licencee. However, in the absence of implied vicarious liability, the licencee is also not liable. He could therefore operate his premises with impunity in disregard of the legislation.
19. *See* text at n. 40, *infra*.

liable only if he has delegated all of his authority to his employee.[20] For example, an employer who delegates the entire management of his premises to a employee will be liable for any offence "knowingly" committed, "permitted" or "allowed" by that employee. If, however, the employer retains any degree of control, then the intent of the employee cannot be imputed to the employer in the absence of connivance or wilful disregard.[21] The reasoning in these cases seems to be that a employer cannot escape liability merely by delegating his responsibilities to someone else.[22]

For offences of strict liability, where no intent is required, a employer is liable for offences committed by a employee in the course of his employment, even where the employer has expressly forbidden the activity in question. Typically these cases involve offences in which selling, or some other activity more appropriate to the function of the employer than the employee, is the central feature of the prohibited conduct. For example, the courts have held a employer liable for sales in violation of trademark legislation, where the sale was transacted by the employee in contravention of the employer's express orders.[23] In some instances, the doctrine of vicarious liability for strict liability offences may be relaxed if the employer can be shown to have acted with due diligence in the performance of his obligations. Such a defence may arise expressly[24] or by implication.[25]

4. Recent Reform Proposals

Judicial criticism of the doctrine of vicarious liability in relation to statutory offences, particularly those requiring a fault element,[26] prompted an inquiry by the English Law Commission in 1972.[27] In its final report, the Commission recommended that only physical acts, and not criminal intent,

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20. *Allen* v. *Whitehead*, [1930] 1 K.B. 211.
21. *See, e.g., R.* v. *Hawinda Taverns Ltd.*, (1955) 112 C.C.C. 361 (Ont. Cty. Ct.).
22. *R.* v. *Winson*, [1969] 1 Q.B. 371 (C.A.).
23. *Coppen* v. *Moore (No. 2)*, *supra*, n. 17. According to some commentators, these cases are not properly instances of vicarious liability. Rather, the offending act is in law the act of the master. *See, e.g.*, Smith and Hogan, *supra*, n. 15; Mewett and Manning, *Criminal Law*, (2nd ed., 1985) 62-5. To quote Lord Russell, the master is the seller, although not the actual salesman. *Coppen* v. *Moore (No. 2)*, *supra*, n. 17 at 313.
24. *See, e.g.*, n. 11, *supra*.
25. *See, e.g., R.* v. *Watch*, (1983) 10 C.C.C. (3d) 521 (B.C.S.C.).
26. *See* especially *Vane* v. *Yiannopoullos*, [1965] A.C. 486, 497 (H.L.) where Lord Reid referred to the delegation principle as a long standing anomaly and one difficult to justify.
27. *Codification of the Criminal Law: Parties, Complicity and Liability for the Acts of Another*, (WP 43, 1972).

be attributed to another person.[28] Therefore a employer should not be liable for an offence committed by his employee unless the employer himself has acted with the required intent. The effect of this recommendation, if adopted, would be to abolish the delegation principle referred to above.[29] The Commission further recommended that vicarious liability should not be interpreted as arising unless the conduct in question is appropriate to the function of the employer and arises in the course of the employee's employment:[30]

> These conditions are in accordance with the results reached in the great majority of cases, and we take the view that in the absence of express provision there can be no justification for imposing vicarious liability.

5. Summary

Generally speaking, the judicial attitude to vicarious liability for offences is one of hostility. It has been referred to as an odious doctrine, albeit one necessary for the enforcement of much modern legislation.[31] For this reason, the courts have, through a convoluted process of statutory interpretation, largely restricted its application to offences of a civil or regulatory nature. Consequently, it is almost never used as a basis for liability where the offence is truly criminal in nature, involving a serious penalty.

To the extent that it embraces offences which carry no suggestion of moral blameworthiness, section 76 of the *Motor Vehicle Act* is consistent with this approach. However section 76(1), on its face, also applies to offences of a serious nature which do carry such a stigma, such as careless driving or driving while impaired. It also envisages the possibility of imprisonment, a serious form of punishment. In this regard, then, it presents a departure from the limited judicial application of the doctrine.

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28. *Codification of the Criminal Law* (Law. Com. 143, 1985) at 93.
29. *See* text accompanying nn. 22-24, *supra*.
30. *Supra*, n. 28 at 92.
31. *Gardner* v. *Akeroyd*, [1952] 2 Q.B. 743, 751 (*per* Lord Goddard C.J.).

D. Vicarious Liability and the *Charter of Rights and Freedoms*

1. The Charter

In 1982, the *Constitution Act, 1982* was enacted. It represented the culmination of a long effort to secure a revised Canadian Constitution that would include an acceptable amending formula and an entrenched statement of rights.

The new statement of rights is contained in Part I of the *Constitution Act, 1982* and is entitled the *Canadian Charter of Rights and Freedoms*. The *Charter* protects civil liberties and provides a national standard to which both federal and provincial legislation must conform. Section 52 provides that any law which is inconsistent with the *Charter* is, to the extent of the inconsistency, of no force or effect. Thus, a law which appears to violate a fundamental freedom or right guaranteed by the *Charter* is open to challenge.

Section 7 of the *Charter* is an important provision which confers certain basic legal rights. It provides:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The proper approach to the application of section 7 has been described in the following terms:[32]

> The approach, therefore, to a resolution of a claim of infringement by statute of a person's s. 7 right is a three-staged one. First, it is necessary to determine whether the impugned legislation impinges on the right described in the first branch of s. 7. If it does not, that is the end of the matter. If it does, then the second stage involves determining whether the impingement is saved under the second branch of s. 7. If it is, that is the end of the matter. If it is not, then it becomes necessary to proceed to the third and final stage to determine if the impingement is saved under s. 1.

Section 1 of the *Charter*, which may save a provision which otherwise offends the *Charter*, provides:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Examining the impugned provision with reference to section 1, therefore, involves a consideration whether it represents a

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32. *Beare* v. *R.*, [1987] 4 W.W.R. 309, 321 (Sask. C.A.) *per* Bayda C.J.S.

liable only if he has delegated all of his authority to his employee.[20] For example, an employer who delegates the entire management of his premises to a employee will be liable for any offence "knowingly" committed, "permitted" or "allowed" by that employee. If, however, the employer retains any degree of control, then the intent of the employee cannot be imputed to the employer in the absence of connivance or wilful disregard.[21] The reasoning in these cases seems to be that a employer cannot escape liability merely by delegating his responsibilities to someone else.[22]

For offences of strict liability, where no intent is required, a employer is liable for offences committed by a employee in the course of his employment, even where the employer has expressly forbidden the activity in question. Typically these cases involve offences in which selling, or some other activity more appropriate to the function of the employer than the employee, is the central feature of the prohibited conduct. For example, the courts have held a employer liable for sales in violation of trademark legislation, where the sale was transacted by the employee in contravention of the employer's express orders.[23] In some instances, the doctrine of vicarious liability for strict liability offences may be relaxed if the employer can be shown to have acted with due diligence in the performance of his obligations. Such a defence may arise expressly[24] or by implication.[25]

4. Recent Reform Proposals

Judicial criticism of the doctrine of vicarious liability in relation to statutory offences, particularly those requiring a fault element,[26] prompted an inquiry by the English Law Commission in 1972.[27] In its final report, the Commission recommended that only physical acts, and not criminal intent,

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20. *Allen* v. *Whitehead*, [1930] 1 K.B. 211.
21. *See, e.g., R.* v. *Hawinda Taverns Ltd.*, (1955) 112 C.C.C. 361 (Ont. Cty. Ct.).
22. *R.* v. *Winson*, [1969] 1 Q.B. 371 (C.A.).
23. *Coppen* v. *Moore (No. 2)*, *supra*, n. 17. According to some commentators, these cases are not properly instances of vicarious liability. Rather, the offending act is in law the act of the master. *See, e.g.*, Smith and Hogan, *supra*, n. 15; Mewett and Manning, *Criminal Law*, (2nd ed., 1985) 62-5. To quote Lord Russell, the master is the seller, although not the actual salesman. *Coppen* v. *Moore (No. 2)*, *supra*, n. 17 at 313.
24. *See, e.g.*, n. 11, *supra*.
25. *See, e.g., R.* v. *Watch*, (1983) 10 C.C.C. (3d) 521 (B.C.S.C.).
26. *See* especially *Vane* v. *Yiannopoullos*, [1965] A.C. 486, 497 (H.L.) where Lord Reid referred to the delegation principle as a long standing anomaly and one difficult to justify.
27. *Codification of the Criminal Law: Parties, Complicity and Liability for the Acts of Another* (WP 43, 1972).

ship of the *Charter* to vicarious liability for motor vehicle offences.

(b) Such a Provision Does Not Violate Section 7 of the Charter Because It Creates an Offence of Strict Liability Only

This view of the relationship first emerged in British Columbia, and it represents the current law of this province concerning the effect of section 76 up to 1988. The constitutional validity of section 76 in its current form, including the 1988 amendments, has not yet been tested.

The leading pre-amendment case is *R.* v. *Watch*.[39] The accused in this case was the owner of a vehicle involved in a hit and run offence. Since the driver was unknown to the authorities, charges were laid against the owner. The accused argued that insofar as section 76 allowed for the conviction of an owner in the absence of a blameworthy state of mind or a wrongful act attributable to him, it gave rise to absolute liability and was therefore inconsistent with the principles of fundamental justice.

This argument was rejected on appeal. Finch J. held that section 76 created an offence of strict liability only. The significance of this conclusion lies in the mental element -- the "*mens rea*" -- which must be present to constitute the offence. Distinctions may be drawn between offences based on whether or not a mental element such as intent or recklessness is an essential component of the offence, and whether the offender will be excused if he used reasonable care. In *R.* v. *Sault Ste. Marie*,[40] the Supreme Court of Canada identified three classes of offences:

(1) those requiring proof of *mens rea* (ordinary offences)

(2) those not requiring proof of *mens rea* but which leave open a defence of reasonable care (strict liability offences)

(3) those not requiring proof of *mens rea* and where the defence of reasonable care is not available (absolute liability offences).

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39. *Supra*, n. 25. The decision at first instance is reported at 22 M.V.R. 179 (Prov. Ct.).
40. [1978] 2 S.C.R. 1299, (1978) 85 D.L.R. (3d) 161.

If section 76 created an offence of strict liability, then an owner who acts with due diligence in the entrustment of his vehicle to another should have a defence to any charge laid as a result of that person's misconduct. Finch J. then went on to consider the *Charter* implications of this conclusion:[41]

> On this view of the legislation, s. 7 of the Charter is not contravened. According to s. 7 there can be no deprivation of liberty except in accordance with the principles of fundamental justice. A statute which imposes criminal liability without the necessity of proving mens rea does not offend the principles of fundamental justice, provided that the accused has the opportunity to escape liability by showing that he acted with reasonable care.

In British Columbia, the result in *R.* v. *Watch* was recently followed in *R.* v. *Rold Enterprises Ltd.*[42] and *R.* v. *Geraghty.*[43] This approach has also found support in New Brunswick[44] and Manitoba.[45]

(c) Such a Provision Violates Section 7 of the Charter but It Can Be Justified as a Reasonable Limit on Freedom Under Section 1

This view of vicarious liability emerged in the decision of the Manitoba Court of Appeal in *R.* v. *Gray.*[46] In issue was the validity of section 229(1) of the *Highway Traffic Act.*[47] The trial judge applied *Watch* and upheld the provision on the basis set out in that case.

The relationship of section 229(1) to section 7 of the *Charter* was reconsidered by the Court of Appeal which concluded that the potential for imprisonment put it in violation of section 7. The court asserted that no defence of reasonable care or due diligence was to be found in the legislation, and that these elements were pertinent only in terms of sentencing. The Court then turned to section 1 of the *Charter.* It held that the object and purpose of the legislation, the effective

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41. *Supra*, n. 25 at 531.
42. [1988] B.C.D. Crim. Conv. 5770-01 (Co. Ct.). This was an appeal from the decision of a Provincial Court Judge who declined to follow *Watch* for the reasons described in *R.* v. *Sachs* (unreported Provincial Court Judgment of Judge Sarich; Campbell River Registry No. 12943).
43. [1988] B.C.D. Crim. Conv. 5770-02 (Co. Ct.).
44. *R.* v. *Feriatte*, (1983) 49 N.B.R. (2d) 246, 129 A.P.R. 246 (Q.B T.D.).
45. *R.* v. *Gray*, [1988] 2 W.W.R. 759 (Man. Q.B.). On appeal the provision was upheld on other grounds. *See* text at n. 46.
46. Unreported; judgment delivered Oct. 12, 1988.
47. C.C.S.M., c. H60.

enforcement of highway traffic laws, justified the provision as a reasonable limitation on the operation of section 7.[48]

(d) Such a Provision Violates Section 7 of the Charter and It Can Not be Justified as a Reasonable Limit on Freedom Under Section 1

This view of provisions like section 76 is the one which appears to command majority support in Canada, and which has been adopted by two of the three appellate courts which have considered them. Earliest of the two leading cases which espouse it is *R.* v. *Burt*,[49] in which the Saskatchewan courts considered the vicarious liability provision of *The Vehicles Act*[50] of that province.

In *Burt* the owner was charged (vicariously) with the offence of operating a vehicle in a manner creating excessive or unusual noise. The trial court, after considering the reasoning in *R.* v. *Watch*, held that a defence of due diligence in the entrustment of one's vehicle is no answer to a charge of this sort. In the absence of a specific offence of negligent entrustment, the defence of due diligence contemplated by the *Watch* decision is entirely beside the point.

Fundamental justice, it was held, encompasses the concept that a person should not be punished in the absence of a wrongful act and, to the extent that section 253 offends against this notion, it is unconstitutional. While its object is to provide a means of coercing the owner to disclose the identity of the driver, the imposition of vicarious penal liability is excessive for this purpose and goes well beyond the reasonable limits envisaged in section 1 of the *Charter*. The decision of the trial court in *Burt* was affirmed on appeal. The issue of vicarious penal liability as a violation of fundamental justice was restated and enlarged upon by Chief Justice Bayda.

The most recent case on this issue is *R.* v. *Pellerin*[51] in which the Ontario Court of Appeal had the benefit of exam-

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48. The analysis of the Manitoba Court of Appeal is less than satisfying in the way it deals with the *Charter* issues. In particular its treatment of the probability or likelihood of imprisonment is puzzling. It was held that any possibility of imprisonment, however slight, carries great weight in determining whether a provision violates s. 7, yet the improbability of imprisonment may tend to save the provision under s. 1.
49. (1985) 21 C.C.C. (3d) 138, 145 (Sask. Q.B.); [1988] 1 W.W.R. 385 (Sask. C.A.).
50. R.S.S. 1978, c. V-3, s. 253.
51. Unreported; judgment delivered Jan. 24, 1989. Appeal from decision of Doyle D.C.J. reported at (1987) 59 C.R. (3d) 19.

ining the reasoning in all the cases referred to above. The Court agreed with both *Burt* and *Gray* and held that the Ontario version of this provision creates an offence of absolute liability which violates section 7 of the *Charter*. The reasoning in *Watch* was rejected. The Court held further that the provision was not saved by section 1, preferring the result in *Burt* to that in *Gray*. The stated basis for this conclusion was that a "saving" by section 1 places an evidentiary burden on the Crown which had not been met in this particular case:

> The Crown submits that if ... [the Act violates] ... s. 7, it nonetheless should be regarded as a reasonable limit that can be demonstrably justified and so is constitutionally valid under s. 1 of the Charter. In this regard, the Crown contends that:
>
> > (a) the objective of ensuring compliance with the obligation to remain at the scene of the accident is sufficiently important to warrant the Legislature's fixing the owner of a motor vehicle with responsibility for such contravention;[52]
> >
> > (b) the measure adopted in s. 181 is rationally connected to the objective (*i.e.*, it is not unreasonable to hold an owner responsible for the use of the vehicle he controls), and does not unduly impair the right in question ....
>
> In the circumstances, the burden is on the Crown of satisfying the court that the limitation is a reasonable one applying the test laid down in *R.* v. *Oakes, supra*. There has been no evidence placed before us as to the importance of the ... [provisions] ... and the possibility of a prison sentence, to the administration of the *Highway Traffic Act* and safety on the highway.

The court speculated that the reason for relying on vicarious liability was:

> ... because at the material time the owner may have been the driver of the motor vehicle or that he may know who the driver was and will disclose it if charged in the hope that the case against the owner will not be pursued.

It concluded:

> But this is not good enough as a basis to deprive him of his liberty for the fault of another. Nothing before us establishes the necessity of resorting to a penalty of imprisonment that might be imposed on the driver rather than some lesser penalty to punish the owner for his conduct as owner. In my

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52. The special reference to hit-and-run offences is a reflection of the structure of the Ontario vicarious liability regime. The *Highway Traffic Act*, R.S.O. 1980, c. 198, s. 181(1) creates a broad and general liability of the owner for offences of the operator. Section 181(2) narrows that by providing that the owner shall not be convicted under subsection (1) for a variety of offences including most moving offences. Hit-and-run (s. 174) is not an offence excluded by subsection (2).

opinion, the Crown has failed to satisfy the onus on it that this is one of the rare cases in which a breach of s. 7 of the Charter can be justified under s. 1 of the Charter.

(e) Conclusion

Given the divergence of opinion which has emerged among the appellate courts that have considered this issue it seems inevitable that the Supreme Court of Canada must ultimately resolve it. That resolution, however, may or may not affect British Columbia. The 1988 amendments to section 76 may put this province on a somewhat different footing.

3. The 1988 Amendments To Section 76

The amendments made to section 76 in 1988 were set out in Chapter II. One particular facet of these amendments calls for further comment in the light of the jurisprudence described in the previous section. A new subsection (1.1) provides, in part:

> (1.1) No owner shall be held liable under subsection (1) where he establishes that
>
> (a) ..., or
>
> (b) the owner exercised reasonable care and diligence when he entrusted the motor vehicle to the person who was, at the time of the violation, in possession of the motor vehicle.

This amendment appears to constitute a codification or restatement of the "due diligence" defence created in *R.* v. *Watch.*

We can only speculate as to the concerns which prompted this amendment, but a reasonable guess is that it represents an attempt by the legislature to insulate section 76 from further challenges under the *Charter.* While the validity of section 76 was upheld in *Watch*, the decisions of the Saskatchewan courts in *Burt* (and, subsequent to the amendment, the decision of the Ontario Court of Appeal in *Pellerin*) suggest that, sooner or later, the question whether the provision constitutes a violation of the principles of fundamental justice will be tested in the British Columbia Court of Appeal or the Supreme Court of Canada. The amendment was drawn with an eye on that event.

4. CONCLUSION

We offer no comment on whether the 1988 amendment, as a matter of constitutional law, is likely to achieve its apparent goal of "charter-proofing" section 76.[53] We would, however, observe that the amendments do not remove the objections in principle that previously existed. The provision continues to rely on vicarious liability as a core concept and it remains appropriate that the section be subjected to a critical examination to ascertain whether retention in its present form is justified.

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53. The amendment will certainly foreclose any argument that the section creates an offence of absolute liability rather than strict liability. There remains, however, the question whether an appeal court would agree with the view in *Watch* that the existence of a defence of reasonable care is sufficient to overcome any suggestion that the section violates the principles of fundamental justice and offends the *Charter*. It has recently been suggested that the position of strict liability offences under the *Charter* is not beyond doubt. In particular, it has been suggested that the Supreme Court of Canada might ultimately hold that mere negligence is not an appropriate standard for penal liability and that fundamental justice requires that some more stringent standard be met. *See* Code, "Rights in the Criminal Process as They Affect Regulatory of Quasi-Criminal Proceedings" in Finkelstein and Rogers, ed., *Charter Issues in Civil Cases* (1988) 279 at 287.

A. Vicarious Liability under Section 76

1. INTRODUCTION

An owner's liability to answer for provincially created motor vehicle related offences arises under section 76 of the *Motor Vehicle Act*. This provision also renders an owner liable for violations committed by some other person entrusted by the owner with the possession of his vehicle.

Until recently, at least, it seems that section 76 has seldom been used to prosecute the owner unless he is also suspected of being the operator. Exceptions arise in cases where the nature of the offence frequently makes it impossible to ascertain the identity of the person responsible for the violation. Examples are hit and run incidents[1] and parking violations.[2] Offences such as driving while impaired, on the other hand, are seldom prosecuted on a vicarious basis, presumably because such charges cannot practically be laid unless the identity of the driver is already known. Where the driver is known, little is to be gained by laying a second charge against the owner, unless the owner has acted with some fault in loaning his car.

An owner charged with an offence committed by a third party has three defences. First, he may establish that the person who committed the offence was not a person entrusted by the owner with possession of the vehicle. This defence arises under subsection (1.1)(a).[3] Second, the owner may establish a defence of "reasonable care and diligence" in entrusting the vehicle. This defence first arose out of *R.* v. *Watch* and is now restated in subsection (1.1)(b). Finally, a person charged in the capacity of owner may exculpate himself by proving that he is the registered owner only and not the "true owner."[4] This defence arises inferentially from subsection (2)(b).

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1. *See, e.g., R.* v. *Feriotte*, (1983) 49 N.B.R. (2d) 246, 129 A.P.R. 246 (Q.B T.D.); *R.* v. *Watch*, (1983) 10 C.C.C. (3d) 521 (B.C.S.C.); *R.* v. *Pellerin*, (Ont. C.A.) unreported judgment delivered Jan. 24, 1989 *aff'g*, (1987) 59 C.R. (3d) 19.
2. *See, e.g., R.* v. *Steinberg*, (1987) 46 M.V.R. 128 (Co. Ct.).
3. Section 76(2) puts the burden of proof on the owner to show that he did not entrust the vehicle to the person in possession of it.
4. This "defence" relates to the case where the use and control, or "beneficial ownership" of the motor vehicle lies with some person other than the registered owner: *see Singh* v. *McRae*, [1971] 5 W.W.R. 544 (B.C.S.C.). The common law meaning of ownership in relation to motor vehicles is discussed in Chapter III.

In Chapter IV, it was noted that the judicial reaction to vicarious liability as a mechanism for imposing criminal responsibility has generally been hostile and that the status of legislation incorporating vicarious liability is open to question under the *Charter*. The principles underlying a provision like section 76, consequently, should be approached critically. It should not be assumed, of course, that any provision which imposes vicarious liability for an offence is, *per se*, undesirable. In some instances, vicarious liability may be justified, but only where the legitimate policies of the legislation cannot be achieved in any other way.

Two fundamental questions must be faced: what are the goals that section 76 is seeking to attain; and can these be achieved through legal techniques more acceptable than the imposition of vicarious liability?

2. Reasons For Imposing Vicarious Liability

The intent behind section 76 appears to be the general enhancement of traffic safety, an aim that is consistent with the overall objective of the *Motor Vehicle Act*. To this end, the imposition of vicarious liability serves four goals. These are:

(a) Disclosure of Driver's Identity

Vicarious liability is useful as a means to determine the identity of a driver who commits an offence. An owner will not normally want to assume responsibility for an offence he himself did not commit. Consequently, he is more likely to disclose to authorities the identity of the person to whom he has entrusted his vehicle. In addition, the defences of "non-entrustment" or "due diligence" will in effect require the owner to identify the driver. Once the driver is known, the authorities can then enforce the provisions of the Act against the actual offender.

(b) Prudent Entrustment

Public safety requires that persons who operate motor vehicles do so in a responsible and competent manner. The imposition of vicarious liability reinforces this goal by encouraging owners to exercise more careful control over the persons by whom, and the circumstances in which, the vehicle will be

used. Under apprehension of penalty, an owner is less likely to loan his vehicle to an irresponsible person. The owner is likely to take greater precautions to satisfy himself as to a third party's competence and to stipulate the manner in which his vehicle is to be used. In this way, the risk to public safety posed by irresponsible or incompetent drivers is reduced.

(c) Easing the Evidentiary Burden

It was pointed out earlier in this Chapter that charges are frequently laid against the owner under section 76 where the operator has offended section 62 by failing to remain at the scene of an accident. Probably this is done in many hit and run cases because the law enforcement authorities suspect that the owner was, in fact, the operator at the time the offence was committed but are not confident that they would be able to meet the burden of proof necessary for a successful prosecution. Consider the following fact pattern:

> A victim is injured in a hit and run incident but he is able to record the licence number of the vehicle involved. The police immediately trace the ownership of the vehicle to one "O." The police proceed to O's home to interview him. O is there and so is the vehicle, engine still warm. O appears to have been drinking. Questioned about his own whereabouts at the time of the accident, O asserts he was at home alone. Questioned about the incident involving his vehicle and who was operating it, O replies that it must have been stolen and then returned by a person unknown to him. Fingerprint evidence is inconclusive, but is consistent with O having been the most recent driver of the vehicle.

A fact pattern such as this, without more, excites suspicion to say the least. The evidence available to the police might satisfy them, or any reasonable person, on a balance of probabilities, that O was the driver. But where the commission of an offence is in issue, the law imposes a much higher standard of proof. The Crown must offer proof beyond a reasonable doubt before O can be convicted directly.

If proceedings are taken under section 76 against O as owner, the Crown faces a much less onerous evidentiary bur-

den. All it need prove beyond a reasonable doubt is that a hit and run offence occurred, and that O is the owner of the vehicle involved. At that point the Crown has made out its case. The evidentiary burden shifts to O to make out what defence he can. He might wish to continue to insist that the vehicle was stolen, but the burden is on him to lead evidence to displace the Crown's case. He may or may not succeed depending on the cogency and credibility of that evidence.

It is the use of section 76 in circumstances such as this that makes it so attractive. Law enforcement authorities would argue that section 76 allows the guilty to be successfully prosecuted in circumstances where they would otherwise go unpunished because of the heavy evidentiary burden associated with proving the identity of the driver.

While this example involves a hit and run incident, there is another offence under the *Motor Vehicle Act* which raises an identical concern. Sections 67 and 92.1 provide that it is an offence for an operator to fail to stop when requested to do so by a peace officer. If our example had involved a high-speed chase, eventually abandoned by the police out of concern for public safety, the same evidentiary considerations would apply.

(d) Fair Distribution of Liability

As between the owner of a motor vehicle and its operator, the imposition of liability on the owner may, in some circumstances, achieve a fair distribution of liability for the commission of an offence.

For example, the regulations[5] to the *Motor Vehicle Act* contain a number of provisions regarding the proper equipment of a motor vehicle. Section 216 of the Act makes it an offence to operate a motor vehicle not equipped as required by the regulations. Section 216, therefore, imposes liability on the operator of the vehicle. The effect of section 76 is that the owner, even where he is not the operator, is also liable. The owner is usually in the best position to know of any defects in the vehicle or deviations from equipment standards, and to take corrective action. It seems appropriate that section 76 permits the owner to be held liable for the offence even though,

5. B.C. Reg. 262/64; B.C. Reg. 26/58, especially Divisions 4-7.

technically, the offence under section 216 arises out of the operation of the vehicle.

(e) The Rational Enforcement of Parking Regulations

Vicarious penal liability may also play a special role in the enforcement of parking regulations, an issue considered later in this Report.

B. Alternative Approaches

The goals identified above are currently pursued through the imposition of vicarious liability. It seems to us, however, that vicarious liability can be abandoned without compromising these objectives. Below we explore other ways of achieving these goals and make appropriate recommendations.

1. Operator Identity

The imposition of vicarious liability serves, in part, as a means to force disclosure by the owner of the driver's identity.[6] This particular need, however, is already dealt with in section 77 of the *Motor Vehicle Act*:

> 77. (1) Where a peace officer has reason to believe that a motor vehicle has been involved in an accident or in the violation of this Act, the *Commercial Transport Act* or the *Highway Act*, the regulations under any of these Acts or the bylaws of a municipality, and so informs the owner or a person in the motor vehicle, it is the duty of the owner or person, as the case may be, if required by the peace officer, to give all information it is in his power to give relating to the identification of the driver of the motor vehicle at the relevant time or during the relevant period.
>
> (2) If the owner or other person fails to comply with subsection (1), or gives information which he knows to be false or does not believe to be true, he commits an offence against this Act.

This provision seems to us to encourage disclosure of the driver's identity in a much more straightforward fashion than a threat of liability under section 76. It imposes a positive obli-

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6. *See R.* v. *Watch*, *supra*, n. 1 at 528. This was also the view expressed in *R.* v. *Burt*, (1985) 21 C.C.C (3d) 138, 146 (Sask. Q.B.):
> It seems to me that the real purpose of the section is to provide a means whereby a form of coercion can be brought to bear upon the owner of a vehicle to disclose who was driving his vehicle or had possession of it at the time when a violation occurred but the actual malefactor was not apprehended or ascertained. In short, it is a device to facilitate enforcement of the provisions of the Act.

gation on the owner[7] of a vehicle that is involved in an offence to identify the driver to the authorities. Failure to do so is an offence under the Act. Failure to comply may also constitute obstruction of a peace officer in the execution of his duty, an offence under section 118 of the *Criminal Code*.[8] Section 77 also gives a peace officer the right to demand information as to the driver's identity from an occupant of a vehicle whether or not that person is the owner.[9] In this sense it is a more effective law enforcement tool than section 76.

Our correspondents have pointed out three ways in which the operation of section 77 might be improved. First, the kinds of offences with respect to which identity information might be sought should be rationalized. For example, offences under the *Firearm Act* in connection with vehicle use are currently within section 76 and there is little reason to exclude them from section 77. But why should the list stop there? Other provincial acts also provide that specified conduct involving a motor vehicle constitutes an offence and a duty of disclosure seems appropriate.[10] The duty might also be extended to violations of federal legislation which involve the operation of a vehicle.[11] It is our conclusion that the reference in section 77(1) to specific acts should be replaced by a generic reference to federal or provincial enactments.[12]

The second suggestion for change which emerged concerns the use of the word "accident" to describe one of the circumstances which may trigger the duty of disclosure. It was suggested that this word might be taken to restrict the scope of the duty to events involving negligence only and that an intentional collision would not be caught. It was noted that section 10(3) of the *Insurance (Motor Vehicle) Act*[13] uses the expression "incident out of which arises injury or death to a per-

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7. Apart from the duty on the passenger discussed below.
8. *See R.* v. *Moore*, [1979] 1 S.C.R. 195. In this case, the accused, who was the operator of a bicycle, drove through a red light. He was stopped by a police officer and requested to identify himself, which he refused to do. S. 58 of the *Motor Vehicle Act*, R.S.B.C. 1960, c. 253 (now s. 67) requires the operator of a vehicle to identify himself to authorities. The Supreme Court of Canada held that failure to do so constitutes a *Criminal Code* offence.
9. The obligation which s. 77 places on a passenger in the vehicle to disclose the identity of the driver is an unusual one insofar as it forms an exception to the general rule that a person who is a witness to a crime is not obliged to disclose information to authorities investigating that crime.
10. For example, the *Wildlife Act*, S.B.C. 1982, c. 57, s. 28, makes it an offence to discharge a firearm from, or harass wildlife with, a motor vehicle.
11. *See* the various provisions of the *Criminal Code* cited in Chapter II.
12. The word "enactment" is deliberately chosen because it is given a broad meaning in the *Interpretation Act*, R.S.B.C. 1979, c. 206, s. 1.
13. R.S.B.C. 1979, c. 204.

son or damage to property" to capture the concept in question. We agree that the language of section 77 might be tightened to meet this concern and believe that the formulation quoted above is appropriate.

A third and final change is to improve the operation of section 77 when there is a "chain" of entrustment. Currently, only the owner is obliged to divulge identification information.[14] Suppose the owner entrusts his vehicle to A and A entrusts the vehicle to B who commits an offence. If the police question the owner, section 77 requires that he disclose that he entrusted the vehicle to A. But if the police then question A he is under no duty to disclose his entrustment to B since that duty is imposed only on the owner. The section should be amended to impose such a duty on persons in A's position.

It is our conclusion that, with these changes to section 77 and the other recommendations set out below, the repeal of section 76 would not impair the investigative powers of the police in discovering the identity of a driver who has committed an offence.

The Commission recommends that:

2. *Section 77(1) of the* Motor Vehicle Act *be replaced by a provision comparable to the following:*

> *77. (1) Where a peace officer has reason to believe that a motor vehicle has been involved*
>
> *(a) in an incident out of which arises injury or death to a person or damage to property,*
>
> *(b) in the violation of an enactment of the province, or*
>
> *(c) in the violation of a statute of the Parliament of Canada*
>
> *and so informs*
>
> *(d) the owner of the motor vehicle,*
>
> *(e) a person, other than the owner, from whom the driver, directly or indirectly,*

14. Ignoring, for the moment, the duty placed on the passenger by s. 77(1).

may have taken possession of the motor vehicle, or

(f) a person in the motor vehicle,

it is the duty of the owner or person, as the case may be, if required by the peace officer, to give all information it is in his power to give relating to the identification of the driver of the motor vehicle at the relevant time or during the relevant period.

2. PRUDENT ENTRUSTMENT

(a) The Policy

Another purpose of section 76 is to prevent an owner from negligently permitting his vehicle to be used by irresponsible or incompetent persons. Indeed, since the 1988 amendments, section 76 itself comes very close to creating an offence of "negligent entrustment," although the owner is actually charged with the substantive offence committed by the driver. For example, if the driver commits the offence of impaired driving, then that is the offence with which the owner will also be charged.[15] In this case, however, the owner may raise the defence of "reasonable care and diligence."[16] If he shows that he exercised reasonable care in the entrustment of his vehicle, his defence will succeed. Since such a defence is not relevant to the offence of impaired driving, the charge to which the owner must respond is, in substance, one of negligent entrustment.

The policy goal of "prudent entrustment" would also seem to underlie section 78. This provision discourages an owner from lending his car to an unlicensed minor. Section 78 makes such conduct an express offence:

> **78.** Every person who, being in possession or control of a motor vehicle, permits it to be driven or operated by a minor who is not the holder of a subsisting driver's licence permitting that operation commits an offence against this Act.

It seems to us that the goal of "prudent entrustment" contemplated by section 76 could likewise be served by the creation of a specific offence of negligent entrustment. This

15. *See* s. 76(1).
16. *See* s. 76(1.1)(b).

seems a less circuitous or objectionable means than the imposition of vicarious liability. Since the owner's fault arises from the act of entrustment, and not from the offence committed by the driver, this approach ensures that the owner's liability is more closely identified with his own conduct. It also lends a more logical foundation to the defence of reasonable care by relating it to an appropriate charge.

(b) A Draft Provision

An offence of negligent entrustment might be framed along the following lines:

> **76A.** Every person is guilty of an offence who, being in possession or control of a motor vehicle, permits it to be driven or operated by another person
>
> (a) if that other person is not the holder of a valid driver's licence permitting that operation, or
>
> (b) if he knows or has reason to believe that the other person is likely to operate the vehicle in a manner or circumstance which constitutes a violation of
>
> (i) an enactment of the province, or
>
> (ii) a statute of the Parliament of Canada
>
> which regulates the operation or equipage of motor vehicles.

This draft provision is meant to replace sections 76 and 78 and contemplates the repeal of both. A number of its aspects call for comment.

(c) Comment

The draft provision embodies features of section 78 in two ways. First and most obvious, the very sound policy underlying section 78 is carried forward in a somewhat changed form. The change relates to its scope. In its current form, section 78 only embraces entrustment to unlicensed minors. It is difficult to see any reason for restricting the principle in this way. It should be an offence to allow one's vehicle to be driven by any person who is not properly licensed to do so. The draft

provision reflects this view. The effect of this would be that in all cases a person is under an obligation to satisfy himself that a person to whom he entrusts his vehicle is properly licensed.

Second, the draft provision does not focus on ownership. Like section 78, it applies to any person in possession or control of a vehicle whether or not that person is an owner. To the extent that section 76 serves a "prudent entrustment" function, it is deficient in that it does not penalize negligent entrustment by non-owners. Like section 77, it does not operate effectively in the "chain of entrustment" situation. For example:

> Owner A prudently entrusts his vehicle to B. B negligently entrusts A's vehicle to C knowing that C will use it in violation of the Act.
>
> (a) Under section 76, in its current form, A will be liable for C's use of the vehicle in violation of the Act. Under subsection (1.1)(b), however, A can raise a defence of reasonable care with respect to the entrustment and he may be acquitted. Since B is not the owner, he is under no liability for entrusting the vehicle to C or for C's use of it.
>
> (b) Under the draft provision, B would be liable for entrusting the vehicle to C knowing C would commit an offence. No question of charging A would arise unless he has behaved imprudently in entrusting the vehicle to B.

The most difficult aspect of creating an offence of this kind is determining what mental element should be present before it is appropriate to subject a person to punishment for an act or omission. The provision set out above (essentially similar to that proposed in the Working Paper) attempts to strike a middle ground: knowledge, or reason to believe, that the person is likely to use the vehicle in an unlawful manner. Concerns as to the appropriate mental element were also raised by some of those who responded to the Working Paper. Views diverged, however, as to how an offence provision might be formulated to meet these concerns. In the result, we are not persuaded that a "negligent entrustment" provision should be

drafted in a fashion significantly different from the one set out above.

(d) Conclusion

The potential liability that section 76 may visit on the owner of a vehicle encourages the owner to be prudent in entrusting the vehicle to others. He is encouraged to lend it only to individuals known to be careful and law abiding. We believe, however, that this salutary result can be achieved more directly and equally effectively through the creation of a new offence of negligent entrustment along the lines described above. This aspect of the benefits of section 76 can, therefore, be retained without using vicarious liability as the means of doing so.

The Commission Recommends that:

3. *Sections 76 and 78 of the* Motor Vehicle Act *be repealed.*

4. *A new section be added to the* Motor Vehicle Act *in a form comparable to the following:*

> *76A. Every person is guilty of an offence who, being in possession or control of a motor vehicle, permits it to be driven or operated by another person*
>
> *(a) if that other person is not the holder of a valid driver's licence permitting that operation, or*
>
> *(b) if he knows or has reason to believe that the other person is likely to operate the motor vehicle in a manner or circumstance which constitutes a violation of*
>
> *(i) an enactment of the province, or*
>
> *(ii) a statute of the Parliament of Canada*
>
> *which regulates the operation or equipage of motor vehicles.*

3. Evidentiary Burden

(a) A Threshold Issue

This chapter earlier explored the way in which section 76 assists law enforcement authorities in prosecuting the "probably guilty." We identified two situations where the evidentiary burden on the issue of identity presents particular problems. These situations are when an unidentified driver fails to remain at the scene of an accident or to stop on a request from a peace officer. Earlier in this chapter, a relatively detailed example was offered of its use in a hit and run setting.

Our example illustrates what might be called the "best-case" use of section 76 for this purpose. As the Working Paper which preceded this Report was being prepared, an example of a different kind emerged. *The Province*, a daily newspaper published in Vancouver, in its October 26, 1987 issue, described a new law enforcement aid:[17]

> **BEWARE CAMERAS!**
>
> Vancouver police are getting even more sneaky -- or snappy.
>
> Starting this week, traffic cops will start zapping motorists with a high-speed camera radar system.
>
> The Swiss-made gizmo will photograph speeding cars as they zip by. "We tried it out in July for a couple of days as an experiment, but this time we mean business," explains Supt. John Lucy.
>
> "And the fine is $75. As soon as a speeder hits the narrow beam, the car is photographed and the speed and time of offence is etched on the film. We'll then notify the registered owner by mail of the offence."
>
> No points will be issued because the owner might not be the offender. The detector will swing into action by Wednesday -- at a secret location.

The device described was used on a one-month trial basis. According to a news item that appeared a few weeks later:[18]

> **PHOTO-TAKING RADAR NABS 501 DRIVERS**
>
> Vancouver police said Friday they issued a total of 501 tickets to speeding drivers in November while experimenting with a new picture-taking radar system.

17. *The Province*, Monday, October 26, 1987 at page 3.
18. *The Vancouver Sun*, Saturday, December 5, 1987 at page A15.

> Traffic Supt. John Lucy said the Multanova system is now being evaluated, with a report expected to be ready by early January.
>
> However, Lucy said any decision to use the unit fulltime will probably not be made until early February -- after the first court cases relating to the tickets are dealt with in January.
>
> "Then I'll send a report...with either a yea or nay on whether the system should be used," Lucy said.
>
> The unmanned radar unit operates by taking a picture of a speeding car and recording its speed and licence number. Speeding tickets are then mailed to the vehicle's registered owner.

As we understand this scheme, no attempt is made to identify the driver. The photo simply identifies the vehicle, through the licence plate number. The liability of the owner, therefore, is based solely on vicarious liability under section 76.

The use of vicarious liability in conjunction with a speed-trap device of this kind represents a significant departure from the circumstances in which it is usually invoked. It gives special urgency to an important threshold question respecting the function of section 76 in easing the evidentiary burden on law enforcement authorities. Before asking whether this function can be met in some way that does not involve vicarious liability, one must first ask whether the function is a proper one at all.

We are unanimous that it is legitimate for a penal statute, in appropriate cases, to shift the burden of adducing evidence to the accused person. These cases are where particular facts that may be in issue are, by their nature or through special circumstances, ones which are peculiarly within the knowledge of the accused. The operator of a vehicle at a particular time is, in the usual course of events, a matter of which the vehicle's owner has better knowledge, and which the owner may be in a better position to prove (or disprove) than law enforcement authorities. It follows that we think it is appropriate to seek an alternative to vicarious liability which will ease the burden on law enforcement authorities associated with proving operator identity.

(b) A Presumption as to Identity

The alternative we have in mind is to introduce into the *Motor Vehicle Act* a rebuttable presumption that, where a vehicle is involved in a violation of the Act, its owner was also

the operator at the relevant time. We believe that this would achieve, in a much more direct and logical fashion, the same result that presently arises under section 76.

Not everyone would regard the introduction of a presumption as an improvement, but at least provisions which embody it are more common and the application and limitations of the principle are better understood by the courts. Such an innovation would undoubtedly be open to constitutional challenge under the *Charter*, but as we pointed out earlier, it cannot be safely assumed that section 76, even in its amended form, is invulnerable. A replacement for section 76, framed in terms of a presumption, might, conceivably, be somewhat easier to defend since there is recent guidance in this area from the Supreme Court of Canada.[19]

A difficult issue, and one which has to a degree divided the Commission, is the breadth of the proposed presumption. Should it be available only in well-defined and limited cases, or should it be available whenever the authorities can identify the vehicle involved in an offence but not the operator? The Working Paper set out the following observations:[20]

> We are all agreed that the presumption ought to apply where the offence in question is hit and run, or failing to stop in compliance with a request from a peace officer. Some members of the Commission would extend the presumption beyond these cases to include any violation where the operator cannot be readily identified. This would include cases in which it is sought to rely on the radar-camera device described above in prosecuting speeding charges. They feel that considerations of public safety warrant the widest application of the presumption.
>
> Other members of the Commission are concerned about extending the presumption beyond the particular and serious offences mentioned above. They see the presumption as a departure from the general principles of penal law that should be reserved for offences in which the need for it can be clearly demonstrated. A blanket presumption carries the danger that it will be abused or trivialized. These members are, provisionally and for the purposes of this Working Paper, prepared to adhere to a proposal for the application of the presumption to all offences. They are, however, anxious to learn if these concerns are more widely shared.

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19. Two *Charter* provisions would be relevant to a presumption as to an element of an offence or matter which the Crown would otherwise be required to prove: s. 11(d) under which an accused is "presumed innocent until proven guilty according to law" and s. 1 which provides that protected rights are subject to "reasonable limits." These were considered by the Supreme Court of Canada in *R.* v. *Whyte*, [1988] 2 S.C.R. 3.
20. Working Paper at 41.

The response to the Working Paper generally favoured confining the presumption to "serious" offences. There was no clear guidance from our correspondents as to what should constitute a serious offence but it was evident that they regarded the concept as somewhat broader than hit-and-run and failing to stop.

In suggesting that the application of the proposed presumption be confined to serious offences, our correspondents seemed mainly concerned that a presumption which applied in a wide variety of circumstances would be extremely vulnerable to a challenge under the *Charter*.

(c) Charter Concerns

(i) Section 11(d)

A starting point in considering the position under the *Charter* of a presumption of identity is section 11(d):

> 11. Any person charged with an offence has the right
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

The Supreme Court of Canada recently reiterated that:[21]

> [T]he presumption of innocence has at least three components. First, an individual must be proven guilty beyond a reasonable doubt. Second, the Crown must bear the onus of proof. Third, criminal prosecutions must be carried out in accordance with lawful procedures and principles of fairness.... [T]he Crown must make out the case against the accused before he or she need respond.

These principles were applied to a statutory provision which required the accused to disprove an essential element of an offence in *R.* v. *Oakes* where it was said:[22]

> In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(d). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue.

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21. *R.* v. *Whyte*, *supra*, n. 19 at 15.
22. [1986] 1 S.C.R 103, 132-3.

This test is sufficiently stringent that many important presumptions fail to meet it.

In *R.* v. *Whyte*[23] the Supreme Court of Canada considered the rebuttable presumption set out in section 237(1)(a) of the *Criminal Code* that, in prosecutions for certain alcohol-related motoring offences, the accused is deemed to have had care and control of the vehicle if it is proven he occupied the driver's seat. The Court had little difficulty in holding that this presumption violated the presumption of innocence in section 11(d) of the *Charter* on the basis of the test laid out in *Oakes*.

We have little doubt that a similar result would occur with respect to any provision which might be introduced into the *Motor Vehicle Act* under which the owner of a vehicle was presumed to be its driver at the time an offence occurred. It too could result in a conviction where a reasonable doubt had been raised. The real question, therefore, is whether such a presumption would be justified under section 1 of the *Charter*.

(ii) Section 1

Section 1 of the *Charter* was referred to briefly in Chapter IV. It was pointed out that section 1 may save a provision which otherwise violates the *Charter*. It provides:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In what circumstances does a provision, which otherwise offends the *Charter* constitute a "reasonable limit" such that section 1 may be invoked to validate it?

In *R.* v. *Whyte*[24] the Supreme Court identified two criteria that must be satisfied for a successful invocation of section 1:

(a) The objective to be served by the provision must be sufficiently important to permit the infringement of a constitutionally protected right; and

(b) The provision must satisfy a proportionality test which itself has three components:

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23. *Supra*, n. 19.
24. *Ibid.*, at 20.

(i) The provision must be carefully designed to achieve its policy objective, and be rationally connected to that objective;

(ii) The provision should impair a right to as minimal a degree as possible; and

(iii) There must be some concordance between the effects of the provision and the underlying objective. The more deleterious the effects, the more important should the objective be.

In the *Whyte* decision, the Court found that the presumption in section 237(1)(a) of the *Criminal Code* satisfied the first criterion. Its objective was to alleviate the pressing social problem posed by drinking drivers. The importance of this objective was thought to be self-evident.

With respect to the proportionality test, the Court considered each element separately. First, the Court held that the provision was carefully drafted and based on a rational and direct connection between the proved fact and the fact to be presumed. For example, it is reasonable to presume that a person who occupies the driver's seat has the care or control of that vehicle. Second, the section was held to infringe the right to be presumed innocent as little as possible. The presumption was characterized as a "restrained parliamentary response to a pressing social problem."[25] In reaching this conclusion the Court seemed to focus its attention on whether the presumption achieved a reasonable accommodation of the competing interests at stake:[26]

> It is important for the purposes of the s. 1 analysis to view s. 237(1)(a) in the context of its overall statutory setting. Parliament has attempted to strike a balance. On the one hand, the Crown need only prove a minimal level of intent on account of the fact that consumption of alcohol is itself an ingredient of the offence. On the other hand, where an accused can show that he or she had some reason for entering the vehicle and occupying the driver's seat other than to drive the vehicle, the accused will escape conviction. Viewed in this light, s. 237(1)(a) constitutes minimal interference with the presumption of innocence guaranteed by s. 11(d) of the Charter.

In addressing the third element, the Court concluded that the effects of the presumption were proportionate to the social ob-

25. *Ibid.*, at 26.
26. *Ibid.*, at 26-7.

jective being advanced. Given the threat to public safety posed by drinking drivers and the elusive nature of a mental element for these offences, it would be impracticable to require the Crown to prove an intention to drive. Casting the offence in terms of "care and control" with the presumption is a reasonable response to this threat.

(d) Conclusion

A statutory presumption respecting the identity of an offender would almost certainly infringe or deny the presumption of innocence guaranteed by section 11(d) of the *Charter*. Having regard to the analysis of the Supreme Court of Canada in the *Whyte* case, would such a presumption be justified by section 1 as a reasonable limitation on the guaranteed rights and freedoms? No definitive answer is possible given the present state of our experience with the *Charter*. Much would depend on the circumstances in which a presumption like this could be invoked. We believe, however, that such a presumption could survive scrutiny under the *Charter* if properly framed and limited.

In terms of the first criterion set out in *Whyte*, the objective underlying the *Motor Vehicle Act* is the safe and orderly conduct of traffic on public streets. To the extent that a presumption is seen as advancing this objective, it would appear to satisfy the first criterion. The second criterion, the proportionality test, raises more difficult issues.

The first element of the proportionality test is the least troublesome. A presumption as to identity could hardly be viewed as unreasonable or arbitrarily framed. The connection between the presumed fact (the owner is the operator) and the proved facts (identified vehicle, unidentified operator) has a rational basis. In other words, it is not unreasonable to assume that a person operating a motor vehicle is also the owner. We believe a presumption would seem to satisfy the first element of the proportionality test.

The second and third elements are interrelated and it is convenient to consider them together. The Commission's original proposal, as set out in the Working Paper, suggested:

> 4. The *Motor Vehicle Act* be amended to provide a rebuttable presumption that

(a) where a motor vehicle involved in an offence can be identified, and

(b) the operator of the vehicle cannot be identified

the owner of the vehicle was the operator at the time the offence occurred.

This proposal extends potentially to all offences under which the operator of a motor vehicle may be liable. It would, for example, encompass non-moving offences and other infractions of a regulatory nature where no question of danger to public safety can arise. We agree with our correspondents who were concerned that this proposal was too broadly framed and the more detailed guidance provided by the *Whyte* case confirms this. The proposal simply does not strike the kind of balance the Supreme Court of Canada referred to in that case.

We have considered whether a presumption confined to "operating offences" or "moving violations" would be any more acceptable. We have concluded that it would not. While it is somewhat closer to the mark, it would still permit the application of the presumption in cases where public safety is not in issue.

It is our conclusion that a two-pronged approach to the definition of circumstances in which the presumption may be invoked will yield a provision which achieves the "balance" referred to in *Whyte*. The first prong is to identify specific offences in which the presumption should be available. To satisfy the second element of the proportionality test, those offences should be serious and, by their nature, be offences in which operator identity is difficult to establish. The offences which we all agree meet these criteria are hit-and-run offences and failing to stop in compliance with a request from a peace officer.[27] Two members of the Commission would also include speeding, in certain circumstances, as one of the specific offences which would trigger the presumption of identity. Their views are set out at greater length in the Reservation which follows the signature page of this Report.

The second prong of our recommended approach is to define the availability of the presumption with reference to the gravity of the consequences of the conduct which constitutes the offence. Where that conduct results in injury or damage to

27. *Motor Vehicle Act*, ss. 62, 67 and 92.1.

person or property, or creates a real risk of harm to person or property, the public interest at stake is sufficiently great to warrant invoking the presumption.

The Commission recommends that:

5. A new section be added to the Motor Vehicle Act *in a form comparable to the following:*

> *76B. Where a motor vehicle involved in an offence can be identified and the operator of the vehicle cannot be identified, it shall be presumed, in the absence of evidence to the contrary, that the owner of the vehicle was the operator at the time the offence occurred if*
>
> *(a) the offence committed was*
>
> *(i) a failure to comply with section 62, [hit and run]*
>
> *(ii) a contravention of section 67, [failing to stop and provide identification] or*
>
> *(iii) a contravention of section 92.1, [failing to stop] or*
>
> *(b) the conduct of the operator in relation to the offence*
>
> *(i) resulted in personal injury,*
>
> *(ii) resulted in property damage,*
>
> *(iii) created a real risk of harm to persons, or*
>
> *(iv) created a real risk of harm to property.*

4. A Fair Distribution Of Liability

It was noted earlier in this Chapter that a person who operates a vehicle that is not equipped in compliance with the regulations is in violation of section 216 of the *Motor Vehicle Act*. Section 76 ensures that the owner is also liable.[28] In this case, the result achieved by vicarious liability is not necessar-

28. In some circumstances the owner may have a defence of reasonable care under subsection (1.1)(b). This might arise where the vehicle was properly equipped at the time of the entrustment but it (unforeseeably) ceased to be in compliance at a later time.

ily offensive as a matter of principle. Equipping and maintaining a vehicle is more appropriately the responsibility of its owner than of a person operating the vehicle with the owner's consent. Therefore, it is only fair that in many cases the owner bear some, if not all, responsibility for a failure to observe standards regarding vehicle equipment or maintenance. In other words, section 76 may achieve a fair distribution of liability with respect to equipment-related offences. The operator or the owner, or both, can be charged as the circumstances of the case may require.

The issue again is the use of vicarious liability for these purposes. It is our conclusion that a fair distribution of liability can be achieved by recasting the relevant provisions of the Act so that liability is expressly assigned to either the owner or the operator (or both). This would require that each charging provision be reviewed and a decision reached regarding who, as between the owner and operator of a motor vehicle, should properly bear responsibility for a given offence. This exercise is not so formidable as it might first appear. The repeal of section 76 would, itself, go some distance since most of the provisions already reflect a decision of this nature.

Part III of the *Motor Vehicle Act*, for example, governs the rules of the road. Its provisions require the driver or operator of a motor vehicle, among other things, to obey traffic signals (s. 130) and speed signs (s. 145); to refrain from driving in a careless fashion (s. 149); to signal appropriately when turning (s. 172); to stop and pull over at the approach of an emergency vehicle (s. 179); to use caution when backing into an intersection (s. 194); and to refrain from driving on a sidewalk (s. 201). The relevant provisions are already drafted in such a way as to place liability directly on the driver or operator. "Driver" is defined in section 115 to mean "a person who drives or is in actual physical control of a vehicle." This seems an eminently sensible assignment of responsibility for moving traffic violations.

Part I of the Act deals largely with registration and licensing requirements for both motor vehicles and drivers. Section 69 creates a general offence for failure to comply with the Act. It provides:

> **69.** A person who contravenes a section of this Act by doing an act that it forbids, or omitting to do an act that it requires to be done, commits an offence.

Part I also creates a number of specific offences. For example, section 12 makes it an offence for a person to operate a motor vehicle that is not properly licensed or does not have current number plates appropriately displayed. Section 23 states that a person shall not drive or operate a motor vehicle unless he has a valid driver's licence and the motor vehicle is properly insured. Section 64 makes it an offence for a person to operate a vehicle while using another person's licence or liability insurance card. Sections 64, 65 and 67 require that the driver produce a valid driver or motor vehicle licence and to stop and give particulars when requested to do so by a peace officer. These provisions appear to assign liability to the appropriate person. In most cases, this person is the driver or operator whose identity will be readily apparent at the time a charge is laid. It is difficult to see any policy that is served by charging the owner, unless he is also the perpetrator of the offence.

Part II of the Act concerns the suspension of licences and prohibitions from driving. Generally, its provisions make it an offence to drive or operate a vehicle while prohibited from doing so by the Superintendent of Motor Vehicles, court order or operation of law. Liability for these offences rests with the driver or operator, and not the owner. Again, this seems to be an appropriate placement of liability.

Finally, Part IV deals with a number of miscellaneous offences, notably the prohibition against operating a motor vehicle with a blood-alcohol content over the prescribed limit (s. 220.1) and operating a motor vehicle that is not equipped according to the standards imposed by regulation (s. 216). Of these, only section 216 is a source of concern. It provides:

> **216.** (1) A person shall not drive or operate a motor vehicle or trailer on a highway or rent a motor vehicle or trailer unless it is equipped in all respects in compliance with this Act and the regulations.

The driver is therefore liable for the use of an improperly equipped vehicle. This liability is reinforced by the regulations to the Act.[29]

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29. *See, e.g.*, B.C. Reg. 26/58, s. 5.01. For the most part, the driver or operator, and not the owner, is prohibited from operating a vehicle that is not equipped according to the requirements imposed by the regulations.

As a general observation, there is nothing offensive in this result. Many defects in equipment will be readily apparent even after the most cursory of examinations. For example, it is relatively easy for a person to determine whether a vehicle has proper head and tail lamps,[30] operative turn signals, windshield wipers or horn,[31] or whether there is a copy of the current motor vehicle licence available for inspection should the need arise.[32] If a person is, or ought to be, aware of any such defects and nonetheless chooses to drive, it is only fair that he should bear the consequences.

On the other hand, there may be defects which are not so obvious. For example, the tail lamps may be affixed in too low a position.[33] The stop lamp or tail lamp wiring may be intermittently faulty.[34] The brake lining may be of inadequate thickness[35] or the brake tubing and hose may be of insufficient length.[36] To render a driver who is not the owner liable in these instances is arguably unfair. The owner will usually be in a better position to know about defects of this nature and to take corrective action where necessary. In these cases, it might be justifiable to visit liability on the owner only.

The proper policy here, we believe, is that the owner should be primarily responsible for ensuring that his vehicle is licensed, insured, equipped and maintained as required by law. The owner is the person who knows, or ought reasonably to know, if anything is remiss with his vehicle. He should be liable for permitting its use while in a defective condition or while it otherwise fails to comply with the law.

Should the operator, as the Act currently provides, be equally liable in all cases? It was suggested above that when the "equipment offence" would not be readily apparent from a cursory visual examination or was of a relatively esoteric kind, the operator deserves some sympathy. Our inclination is not to limit the operator's liability. Defining the nature and extent of the limitation would not be a trivial task. For example, it would be necessary to address whether a higher

30. *See* B.C. Reg. 26/58, Division (4), "Lamps."
31. *See* B.C. Reg. 26/58, Division (7), "Other Equipment."
32. *See* Schedule to B.C. Reg. 26/58, "Standards for the Approval of a Motor Vehicle," s. 1.
33. *See* B.C. Reg. 26/58, s. 4.03.
34. *See* Schedule to B.C. Reg. 26/58, *supra*, n. 32, ss. 4, 5.
35. *See* B.C. Reg. 26/58, s. 5.08.
36. *See* B.C. Reg. 26/58, s. 5.06.

standard should be imposed on professional drivers in relation to the inspection of vehicles driven in the course of employment.

One final point calls for comment. It must not be assumed that, just because the improper equipment or maintenance of a vehicle has the potential to render the owner or operator liable for an offence, charges invariably ensue when a violation occurs. The reason the Act requires that certain standards of maintenance and equipment be met is to keep unsafe vehicles off the road. It is our impression that the enforcement policy with respect to these standards also operates with that goal in mind. These standards, backed up by penal sanctions, give law enforcement authorities coercive powers which can be exercised on-the-spot to persuade or compel owners and operators to remove unsafe vehicles from the road. By and large, this is an area where common sense prevails.

The Commission recommends that:

6. A new section be added to the Motor Vehicle Act *in a form comparable to the following:*

> *216A. Where a provision of this Act or the regulations prohibits the driving or operation of a motor vehicle which is not licensed, insured, equipped or maintained in a stipulated fashion, the owner of a motor vehicle who permits it to be driven or operated in violation of that provision commits an offence.*

5. Parking Violations

We referred earlier to the use of section 76 in the enforcement of parking regulations. Parking violations form another category of offence in which it is difficult to identify the person actually responsible for the violation. For this reason, the imposition of liability on the owner, through vicarious liability, is available for use in the enforcement of parking laws. The possibility of this use receives explicit recognition in section 76(3):

> (3) An owner of a motor vehicle is liable under subsection (1) notwithstanding that the motor vehicle, at the time of the violation, is unattended or is not in the possession of any person.

Whether section 76 will be relied upon to fix liability on the owner in a particular case will probably depend on the way in which the parking law is framed. If, by its terms, it imposes liability directly on the vehicle owner, reliance on section 76 is unnecessary. On the other hand, where the parking law expressly, or by necessary implication, focuses on the conduct of the operator, or the *act of parking*, prosecution of the owner will probably require reliance on section 76.

While we have not reviewed all of the parking by-laws enacted by British Columbia municipalities and similar competent bodies to determine the extent of current reliance on vicarious liability in the enforcement of parking laws, those we have looked at convince us that the repeal of section 76 would leave an undesirable hiatus in this regard.[37] The solution, it seems to us, is the retention of the concept of vicarious liability to impose liability on the owner of a vehicle for any parking violations involving it.

We concede that this has the appearance of adopting an inconsistent policy and, to a degree, this is true. We believe, however, that on this narrow point principle must bend to pragmatism. Parking offences differ from most others in that the penalties are small and carry no realistic risk of imprisonment or loss of driving privileges. Moreover, the person who actually committed the offence is almost never present at the time legal process (usually a ticket) issues in relation to the offence. If the authorities were required, in every case involving a violation of parking restrictions, to discover the identity of and proceed against the actual driver, the difficulties of effectively enforcing such restrictions would be enormous.

So far as we are aware, the use of vicarious liability in the enforcement of parking laws has been uncontroversial and we would expect that to continue. So long as the vehicle owner is insulated from liability for parking offences in the kinds of circumstances where he is currently protected under section 76 (*e.g.*, where the vehicle is stolen and then illegally parked) the retention of vicarious liability in this limited context is innocuous.

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37. In particular, parking by-laws enacted pursuant to the *Vancouver Charter*, S.B.C. 1953, c. 55, all seem to focus on the conduct of the operator.

The Commission recommends that:

7. A new section be added to the Motor Vehicle Act *in a form comparable to the following:*

> *76C. (1) The owner of a motor vehicle which has been parked in violation of a regulation or bylaw enacted by a municipality or other competent authority is liable for that violation.*
>
> *(2) No owner shall be held liable under subsection (1) where he establishes that*
>
> > *(a) the person who was, at the time of the violation, in possession of the motor vehicle was not entrusted by the owner with possession, or*
> >
> > *(b) the owner exercised reasonable care and diligence when he entrusted the motor vehicle to the person who was, at the time of the violation, in possession of the motor vehicle.*

C. Section 76: Conclusion

There are many circumstances in which the imposition of vicarious penal liability under section 76 achieves results that are socially beneficial. The means by which these results are achieved, however, are less clearly desirable. Vicarious liability in the larger context of criminal law is something that, generally, has not found favour as a matter of social policy. It has provoked judicial hostility and its use has been strictly confined. If the social goals and policy objectives sought to be attained through vicarious liability can be reached through a more acceptable alternative, that is the path that should be taken. The 1988 amendments to section 76 do not alter this conclusion.

In this Chapter, thus far, we have identified and articulated what we believe are the goals and functions of section 76 and have described and made recommendations respecting other ways in which they can be met and served. In every case the functions of the section can be met through the enactment of new provisions, or the modification of existing ones, shaping

each so as to avoid vicarious liability. Section 76 can and should be repealed and replaced by the provisions recommended above.

D. The Meaning of "Owner" for Purposes of Penal Liability

While the recommendations set out above represent a shift away from the vicarious liability approach of section 76, they may still result in the "owner" of a vehicle being held liable for particular conduct or through the application of a presumption. For this reason, and because there are other provisions of the *Motor Vehicle Act* which are a potential source of penal liability, it is important that the concept of "owner" for that purpose be carefully defined.

Support for this view is found in section 76 itself. A special definition is provided in subsection (4):

> **76.** (4) In this section, "owner" includes a person in possession of a motor vehicle under a contract by which he may become the owner on full compliance with the contract, and in whose name alone the motor vehicle is registered.

This provision is similar to section 79(3) in that it brings the conditional buyer into the definition of owner. It is different in that it does not expressly exclude the conditional seller from the definition. It shares the failure of section 79(3) to address the position of the long-term lessor of a vehicle.

Although we have recommended the repeal of section 76, it remains important that there be a special definition of "owner" for the purposes of penal liability. In the absence of such a definition, the meaning of "owner" would be determined solely with reference to the interaction of the common law[38] meaning of that term and the general definition in section 1 of the Act. This could lead to confusion and sometimes unfair results.

In Chapter III we explored the principles that should govern the development of a definition of "owner" for the purposes of vicarious civil liability. Our observations in that context apply with equal force here. We would, therefore, adopt the definition of owner set out in Recommendation 1 as appropriate to determine who should or should not be visited with

38. *See* Chapter III, part B, sec. 2.

penal liability where that liability is fixed on the owner of a vehicle.

The Commission recommends that:

8. A section be added to the Motor Vehicle Act *which, for the purposes of liability for an offence arising under the Act, defines "owner" in the manner described in Recommendation 1.*

E. Miscellaneous Issues

1. Section 80

Section 80 of the *Motor Vehicle Act* provides:

> **80.** Each member of a licensed partnership is liable to the penalties imposed against licensees for breach of this Act.

This provision is an enigmatic one. As we noted in Chapter II, perhaps it applies to persons engaged in selling or importing motor vehicles to ensure that they are held accountable in the same way as other owners. Perhaps it applies whenever two or more persons share a licence. The provision has not been the subject of judicial consideration since its enactment in 1911 and any interpretation is at best speculative. It does not seem to us that the repeal of this provision would occasion any great mischief, and it is our conclusion that this should be done.

2. Section 81

Section 81 deals with the liability of an owner for offences relating to the equipment or maintenance of his vehicle:

> **81.** (1) The registered owner of a motor vehicle by means of or in respect of which motor vehicle an offence against this Act or the regulations with respect to the equipment or maintenance of the vehicle is committed by his employee, servant, agent or worker, or by any person entrusted by him with the possession of the motor vehicle, shall be deemed to be a party to the offence so committed, and is personally liable to the penalties prescribed for the offence as a principal offender.
>
> (2) Nothing in this section relieves the person who actually committed the offence from liability for it.
>
> (3) On every prosecution of a registered owner of a motor vehicle for an offence against this Act or regulations that has been committed by means of or in respect of that motor vehicle, the burden of proving that the offence was not committed by him and that the person committing the offence was not his employee, servant, agent or worker, or a person entrusted by him with the possession of the motor vehicle is on the defendant.

This provision makes the owner primarily liable for a failure to comply with the standards governing the equipment and maintenance of his vehicle. Where that failure is the fault of one of the persons identified in subsection (1), then the owner is liable along with the perpetrator. The substance of this section is reflected in the new provision set out in recommendation 7. It is our conclusion that section 81 can safely be repealed.

The Commission recommends that:

9. Sections 80 and 81 of the Motor Vehicle Act *be repealed.*

3. The Commercial Transport Act

In Recommendation 6 we suggest, for the reasons set out, that a new section 216A be added to the *Motor Vehicle Act* to impose liability directly on the owner, as well as the operator, for offences in respect of the equipment, maintenance and licensing of a vehicle which he permits to be driven in violation of the Act. The reasoning behind this recommendation prompted a suggestion that the new section should also impose liability where the owner permits an improperly loaded vehicle to be driven by another.

This suggestion commended itself to us but on closer examination we concluded that it might be better implemented through an amendment to section 15 of the *Commercial Transport Act*.[39] This section creates the substantive offences in relation to overloaded and oversize vehicles and operates within a suitable matrix of definitions.

The Commission recommends that:

10. The following be added to the Commercial Transport Act *as section 15(2.1):*

> *(2.1) The owner of a commercial vehicle who permits it to be driven or operated by another person in violation of subsection (1) commits an offence and is liable to the penalties set out in subsection (2) as if he were the driver or operator.*

39. R.S.B.C. 1979, c. 55. S. 15 is set out as Appendix B.

CHAPTER VI CONCLUSION

A. Summary

The recommendations made in this Report are designed to rationalize and improve the operation of a group of provisions in the *Motor Vehicle Act* which are concerned, directly or indirectly, with the liability of the owner of a vehicle for wrongs and offences committed by another. These provisions were adopted at various times and their role and relationship are frequently unclear. So far as the owner's liability for offences is concerned, these provisions raise other issues. As a basic question of legal policy, when is it right for one person to be held liable for an offence committed by another?

The *Canadian Charter of Rights and Freedoms* has added a further dimension to the debate. While the key provision of the *Motor Vehicle Act* has not yet been vitiated on constitutional grounds, it has not been fully tested. Similar provisions in other provinces have been held to offend the *Charter*.

At bottom, our concern is with justice. There are simply too many circumstances in which a person who is innocent by any reasonable standard might find himself mulcted in liability. We believe the aims and policies of the Act can be met in ways that are less offensive and equally effective.

The comments above relate mainly to liability for offences. Vicarious liability for civil wrongs gives rise to fewer concerns. Even here, however, there is room for improvement, and an appropriate recommendation is made.

B. List Of Recommendations

The Commission recommends that:

1. *Section 79(3) of the* Motor Vehicle Act *be repealed and replaced by provisions comparable to the following:*

> *79. (3) For the purposes of this section, "owner" includes a person who is in possession of a motor vehicle as*

(a) the purchaser under a contract by which he may become its owner on full compliance with the contract; and

(b) the lessee under a lease for a term of 60 days or more

(4) For the purposes of this section, "owner" does not include the seller, or lessor in a transaction described in subsection (3). **(Page 19-20)**

2. Section 77(1) of the Motor Vehicle Act *be replaced by a provision comparable to the following:*

77 (1) Where a peace officer has reason to believe that a motor vehicle has been involved

(a) in an incident out of which arises injury or death to a person or damage to property,

(b) in the violation of an enactment of the province, or

(c) in the violation of a statute of the Parliament of Canada

and so informs

(d) the owner of the motor vehicle,

(e) a person, other than the owner, from whom the driver, directly or indirectly, may have taken possession of the motor vehicle, or

(f) a person in the motor vehicle,

it is the duty of the owner or person, as the case may be, if required by the peace officer, to give all information it is in his power to give relating to the identification of the driver of the motor vehicle at the relevant time or during the relevant period. **(Page 41-42)**

3. Sections 76 and 78 of the Motor Vehicle Act *be repealed.* **(Page 45)**

4. A new section be added to the Motor Vehicle Act *in a form comparable to the following:*

76A. Every person is guilty of an offence who, being in possession or control of a motor vehicle, permits it to be driven or operated by another person

(a) if that other person is not the holder of a valid driver's licence permitting that operation, or

(b) if he knows or has reason to believe that the other person is likely to operate the vehicle in a manner or circumstance which constitutes a violation of

(i) an enactment of the province, or

(ii) a statute of the Parliament of Canada

which regulates the operation or equipage of motor vehicles. **(Page 45)**

5. A new section be added to the Motor Vehicle Act *in a form comparable to the following:*

76B. Where a motor vehicle involved in an offence can be identified and the operator of the vehicle cannot be identified, it shall be presumed, in the absence of evidence to the contrary, that the owner of the vehicle was the operator at the time the offence occurred if

(a) the offence committed was

(i) a failure to comply with section 62, [hit and run]

(ii) a contravention of section 67, [failing to stop and provide identification] or

(iii) a contravention of section 92.1, [failing to stop] or

(b) the conduct of the operator in relation to the offence

(i) resulted in personal injury,

(ii) resulted in property damage,

(iii) created a real risk of harm to persons, or

(iv) created a real risk of harm to property. **(Page 54)**

6. A new section be added to the Motor Vehicle Act *in a form comparable to the following:*

> *216A. Where a provision of this Act or the regulations prohibits the driving or operation of a motor vehicle which is not licensed, insured, equipped or maintained in a stipulated fashion, the owner of a motor vehicle who permits it to be driven or operated in violation of that provision commits an offence.* **(Page 58)**

7. A new section be added to the Motor Vehicle Act *in a form comparable to the following:*

> *76C. (1) The owner of a motor vehicle which has been parked in violation of a regulation or bylaw enacted by a municipality or other competent authority is liable for that violation.*
>
> *(2) No owner shall be held liable under subsection (1) where he establishes that*
>
> *(a) the person who was, at the time of the violation, in possession of the motor vehicle was not entrusted by the owner with possession, or*
>
> *(b) the owner exercised reasonable care and diligence when he entrusted the motor vehicle to the person who was, at the time of the violation, in possession of the motor vehicle.*
> **(Page 60)**

8. A section be added to the Motor Vehicle Act *which, for the purposes of liability for an offence arising under the Act, defines "owner" in the manner described in Recommendation 1.*
(Page 62)

9. Sections 80 and 81 of the Motor Vehicle Act *be repealed.*
(Page 63)

10. The following be added to the Commercial Transport Act *as section 15(2.1):*

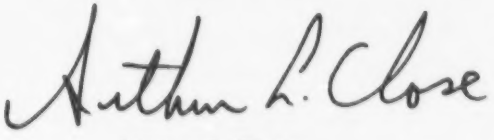
> *(2.1) The owner of a commercial vehicle who permits it to be driven or operated by another person in violation of subsection (1) commits an offence and is*

liable to the penalties set out in subsection (2) as if he were the driver or operator. **(Page 63)**

C. Acknowledgments

We wish to thank all those who took the time to consider and respond to the Working Paper that preceded this Report. The comments we received were thoughtful and assisted greatly in the formulation of our final recommendations.

We would also like to acknowledge the contribution of Deborah Cumberford, a former member of the Commission's research staff, who undertook the initial research for this study and assisted in the preparation of the Working Paper.



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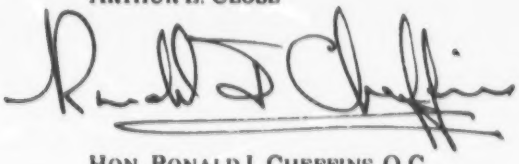

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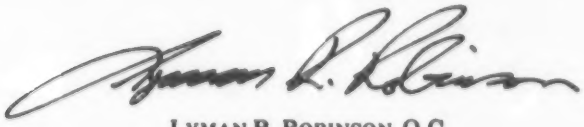

LYMAN R. ROBINSON, Q.C.

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RESERVATION

by
Lyman R. Robinson, Q.C.
and
Hon. Ronald I. Cheffins, Q.C.

A. Introduction

We fully endorse all of the Recommendations of the Commission in this Report except Recommendation 5 which pertains to the proposed section 76B of the *Motor Vehicle Act*. In our opinion, a modification to section 76B is desirable. The enumerated offences in section 76B(a) should be expanded to include the offence of speeding where the speeding occurs in close proximity to other vehicles or persons. The majority of Commission members presently take the view that the Courts would likely strike down any attempt to include speeding within the scope of section 76B. We do not agree with that conclusion.

B. Speeding and the "Real Risk of Harm" Test

Before attempting to provide a legal and factual justification for including speeding within the offences enumerated in section 76B(a), it may be worthwhile to analyse how the offence of speeding would be dealt with in relation to section 76B in the form set out in the body of the Report. If speeding results in personal injury or property damage or creates a real risk to persons or property, section 76B(b) will permit prosecution of the owner. Proof of actual injury to persons or damage to property should be straightforward in most cases. The person who suffered the injury or damage will be able to testify in many cases both as the identity of the vehicle and the injury or damage. Where there has not been actual injury or damage, and it is necessary to prove a "real risk" of injury or damage, it will be necessary in most cases to call *viva voce* evidence of a witness who can give testimony about the "real risk" caused by a "near miss." In many cases, the evidence would be given by a peace officer who observed the speeding. The court will then have to determine whether the "near miss," when viewed

in the context of the surrounding circumstances, constitutes a real risk of harm.

C. The Multanova Camera Technology

While the manner of proof described above will suffice for traditional methods of detecting speeders, it fails to take into account the new technology for detecting speeders which is currently available in the form of the Multanova camera. The significant feature of the Multanova camera, for the purpose of this discussion, is that it photographs the licence plate of motor vehicles and records the speed of a motor vehicle and the time of the photograph on the negative. More importantly, it has the capability of being used without the presence of an operator thereby permitting the assignment of police personnel to other police functions. After examining the photographs and recorded speeds, a ticket is issued to the owner of the vehicle. If the Multanova technology is used without the presence of an police officer, it would not be possible, in most cases, to prove the "real risk of harm" that is required by the formulation of section 76B set out in the body of the Report. On the other hand, if "speeding in close proximity to other vehicles or persons" is included as one of the enumerated offences, the proximity of other vehicles or persons can be proven by reference to adjacent frames of film taken by the Multanova camera.

D. The *Charter*

We acknowledge, as does the majority of the members of the Commission, that the courts may conclude that section 76B infringes section 11(d) of the *Charter*. If that occurs, the section, if it is to be sustained, will have to justified on the basis of section 1 of the *Charter*. The most authoritative decision of the Supreme Court of Canada with respect to what is required to uphold a provision of this nature, under section 1 of the *Charter*, is *R.* v. *Whyte*.[1] In *Whyte*, the Court identified two basic criteria which must be satisfied in order to justify the invocation of section 1 of the *Charter*. First, the objective to be

1. [1988] 2 S.C.R. 3, 64 C.R. (3d) 123.

served by the provision in question must be sufficiently important to permit the infringement of a constitutionally protected right. In the *Whyte* case, the Court concluded that the objective of detecting and removing impaired drivers from the roads was a sufficiently important objective to permit the infringement of the rights provided by section 11(d) of the *Charter*. Therefore, the first question with respect to whether speeding should be included within section 76B is whether the objective of deterring speeding on the Province's highways is a similarly important objective.

E. "Unsafe Speed" as a Cause of Traffic Accidents

Is there a causal connection between speeding and traffic accidents? Presumably, the reason we have speed limits on our streets and highways is the belief that speeds in excess of the posted limits are more likely to contribute to the cause of traffic accidents which involve property damage or personal injury. There has not been as much empirical analysis of the causal connection as might be expected but the information which has been gathered in British Columbia is supportive of the thesis that there is a significant causal connection between speeding and traffic accidents.

Mr. G. William Mercer, Ph.D. of the B.C. CounterAttack Program, Ministry of Labour and Consumer Services, has analyzed over one hundred thousand police traffic accident reports for the years 1985 - 1987. These reports were completed by the investigating police officer who identified one or more of the contributing causes of the accident from a list of probable causes of the accident. The list includes "driving without due care," "alcohol related," "driving at unsafe speed," "fail to yield" and others. "Unsafe speed" may mean that the operator of the vehicle was speeding but it may also mean that the vehicle was travelling too fast for the weather or road conditions notwithstanding that the vehicle was travelling within the legal speed limit.

Dr. Mercer has published his analysis of these police reports in a series of reports. His analysis of the 1985 traffic accident reports is contained in a document entitled "CounterAttack Traffic Research Papers."[2] The section of the paper on

2. Ministry of Attorney General, Province of British Columbia, 1986.

"Fatality-Producing vs. Injury-Only Traffic Accidents: Trends, Characteristics, Persons Involved, and Consequences,"[3] contains information with respect to those factors which contributed to accidents involving fatalities and personal injuries. Based on the information contained in Dr. Mercer's paper, we have ranked the contributing factors in relation to fatal accidents in Table I below.

TABLE I

Contributing Factors to Fatality Accidents in 1985
(Ranked in Order of Frequency)

	Percentage of Fatalities
Driving at Unsafe Speed	33%
Alcohol Related	30%
Driving Without Due Care	29%
Due to Weather	9%

N.B. The total exceeds 100% because more than one factor may be listed in the Report

In Table II, We have ranked the contributing factors in relation to personal injury accidents.

TABLE II

Contributing Factors to Personal Injury Accidents in 1985
(Ranked in Order of Frequency)

	Percentage of Fatalities
Driving Without Due Care	27%
Fail to Yield	16%
Driving at Unsafe Speed	14%
Alcohol Related	13%
Due to Weather	11%

3. *Ibid.*, at page 58.

In both Table I and Table II, "unsafe speed" ranks higher than alcohol as a contributing factor. Therefore, we submit that deterring speeding is at least as important as deterring impairment by alcohol as a means of reducing the personal injuries and property damage on the Province's highways.

Dr. Mercer's 1987 paper entitled "Alcohol-Related Casualty Traffic Accidents: Trends, Characteristics, Persons Involved, and Consequences,"[4] contains information about contributing factors in relation to accidents where alcohol was involved and where it was not involved. In Table III, we have ranked the contributing factors where alcohol was not involved.

TABLE III

Contributing Factors to Casualty Accidents in 1987
Where Alcohol was Not Involved
(Ranked in Order of Frequency)

	Percentage of Fatalities
Driving Without Due Care	26.5%
Fail to Yield	18.5%
Driving at Unsafe Speed	13.2%
Due to Weather	8.8%

Table IV ranks the contributing factors where alcohol was involved.

TABLE IV

Contributing Factors to Casualty Accidents in 1987
Where Alcohol was Involved
(Ranked in Order of Frequency)

	Percentage of Fatalities
Driving Without Due Care	46.3%
Driving at Unsafe Speed	28.9%
Fail to Yield	6.0%
Due to Weather	3.5%

4. British Columbia, 1987 (February, 1989) at 15.

Although"unsafe speed" does not rank as high in the 1987 statistics, it remains as a significant contributing factor to casualty accidents particularly where alcohol is also involved.

It would be helpful to have more extensive empirical data on the causal relationship between speeding and traffic accidents. Unfortunately, Statistics Canada does not segregate speeding from other provincial offences in its analyses of traffic offences and the Insurance Corporation of British Columbia has not compiled this type of data. Although additional statistical information might be obtained from some jurisdictions in the United States, such information would be subject to the criticism that it pertains to regions with different geographic characteristics, different laws, and different behavioral attitudes of drivers. The information contained in Tables I to IV inclusive, while it may not be as comprehensive as one would like, is the only information that is available at the present time with respect to British Columbia.

In *R.* v. *Whyte*,[5] the Supreme Court of Canada upheld a legislative provision whose purpose was intended to overcome one of the difficulties of proof with respect to charges involving impairment by alcohol. The objective of that legislative provision is to reduce personal injuries and property damage attributable to the use of alcohol by those in control of motor vehicles. The purpose of adding speeding to section 76B(a) is to overcome one of the difficulties of proof with respect to charges of speeding with the objective of reducing personal injuries and property damage on our highways attributable to speeding.

F. The Multanova Pilot Project

How can speed limits be more effectively enforced? The use of the Multanova technology as a method of detecting speeders was referred to earlier in this Reservation. The Multanova camera was used on an experimental basis in both Victoria and Vancouver in recent years.. The newspaper reports, which are quoted in the body of the Report, tend to focus upon the number of speeders who were recorded by the Multanova camera. While these newspaper reports do indicate the mag-

5. *Supra*, n. 1.

nitude of the speeding problem, they do not reveal the impact which the use of the Multanova camera can have on deterring speeding and reducing the number of traffic accidents, injuries and property damage during the period of the pilot project.

The pilot project on the use of the Multanova camera conducted by the Victoria City Police Department extended from March 15, 1988 until May 26, 1988. The camera was always used with an officer being present. Statistics were kept during this period which may be compared with statistics compiled for the same period in the previous year. Statistics for previous years were kept on a monthly basis. Therefore the use of the Multanova in the last half of March has been ignored. Table V compares the statistics for the complete months of April and May for the years 1987 and 1988.

TABLE V

	Apr. 1 to Apr. 30 1987	May 1 to May 31 1987	Apr. 1 to Apr. 30 1988	May 1 to May 31 1988
Speeding violations detected by Multanova			267	584
Speeding violations detected by traditional enforcement methods, *i.e.*, radar	422	299	*	*
Traffic accidents (all types)	334	307	301	316
Traffic accidents involving personal injury	85	68	64	68
Traffic accidents involving a fatality	2	1	0	0
Traffic accidents involving property damage over $400	174	168	133	143

* The keeping of statistics with respect to the number of speeders detected by radar was discontinued in 1988 and consequently it is not possible to compare the number of speeding violations detected by this means of enforcement during the Multanova project with the number of radar detections in 1987.

Although there was only a marginal decline in the number of traffic accidents during the two month period when the Multanova was used in Victoria, there was a significant drop in the number of personal injuries, fatalities and accidents with property damage over $400. This suggests that while the decrease in the number of accidents may not be significant, the accidents were less severe and this may be attributable to driving within the speed limits.

The impact of the effect of the use of the Multanova camera may also be examined in relation to the repeated uses of the camera at the same location. For example, the camera was set up on the 1400 Block Hillside Avenue on both Thursday, April 28, 1988 and Wednesday, May 11, 1988 at roughly comparable times of the day. The results are shown below in Table VI.

TABLE VI

	April 28	May 11
Period of Use	19:57-21:36	18:31-19:17
Elapsed Time Camera in Use	99 minutes	46 minutes
Tickets Generated (speed exceeded limit)	25	14
Tickets Issued	21	6

The difference between "tickets generated" and "tickets issued" is explained by reference to several factors. Although a ticket would be "generated" by the camera whenever a vehicle exceeded the speed limit, a ticket was not issued where, for example, the excess speed was *de minimis* or the license plate was not clearly readable.

In Table VI, it may be observed that while the number of tickets generated per minute is about the same, there was a significant drop in the tickets issued from one for every 4.7 minutes to one for every 7.6 minutes. It is submitted that these statistics suggest that the awareness by members of the driving public that the Multanova camera was being used contributed to a reduction of speeding in the area.

Similar patterns may be observed with respect to repeated uses of the Multanova at other locations; however, the drop could be explained by the different time of day and traffic volume when the two tests were conducted.

The Vancouver City Police Department has also used the Multanova camera on a very limited experimental basis. Its use was limited to a few days and there were no repeat uses of the camera at the same location at comparable times of the day. Therefore, it is not possible to make any valid statistical comparisons between those days when the Multanova was used and comparable periods when it was not in use.

The City of Calgary Police Department acquired a Multanova camera in May of 1988 and it has been regularly used since that time. Although the Department is currently undertaking an empirical study which will lead to the development of some statistics on its impact on traffic accidents, no empirical analysis of statistics with respect to its effect upon the number or severity of traffic accidents is currently available.

G. *R.* v. *Whyte's* Second Criterion

The elements of the second criterion identified in the *Whyte* case are summarized at pages 50 and 51 of the Commission's Report. All of the offences enumerated in section 76B must meet these requirements. We submit that the arguments, in support of the inclusion of the other offences, apply equally to the offence of speeding; however, for the sake of completeness, we shall examine the offence of speeding in relation to each of these requirements.

First, the measure must be carefully designed to achieve the objective of the legislation with a rational connection to the objective. The objective, in the case of the offence of speeding is to deter speeding and thereby reduce the injuries and property damage attributable to speeding. In many cases, the owner of a vehicle is the operator and therefore there is a rational connection between ownership of a vehicle and liability for the offence of speeding. In those cases, where the owner is not the operator, the owner has an opportunity to adduce evidence that he or she was not the operator at the time of the alleged offence.

The second requirement is that the measure should impair the right or freedom as little as possible. The right is only impaired when the offence takes place in close proximity to other vehicles or persons. If the speeding takes place on a deserted highway or in the middle of the night where no other vehicles or pedestrians are at risk, the section does not have any application to speeding unless the conduct falls within section 76B(b).

Finally, there must be a proportionality between the effects of including speeding within section 76B(a) on the right to be presumed innocent and the benefit of reducing the incidence of speeding and the reduction of injuries and damage. At the present time, the fine imposed on an owner for the offence of speeding is $75.00. There is no risk of imprisonment or loss of other privileges. If the objective of deterring speeding is attained, there will be monetary savings in terms of a reduction of property damage and compensation for personal injuries and a reduction of the pain and suffering caused by vehicle accidents that are attributable to speeding. This saving should be reflected in lower insurance costs which will benefit the whole of the motoring public. With respect to this final requirement, the words of La Forest J. in *R.* v. *Edwards Books & Art Ltd.*[6] may be helpful:

> [I]n describing the criteria comprising the proportionality requirement, the court has been careful to avoid rigid and inflexible standards. That seems to me to be essential. Given that the objective is of pressing and of substantial concern, the Legislature must be allowed adequate scope to achieve that objective. It must be remembered that the business of government is a practical one. The Constitution must be applied on a realistic basis having regard to the nature of the particular area sought to be regulated and not on an abstract theoretical plane. In interpreting the Constitution, courts must be sensitive to... `the practical living facts' to which a Legislature must respond.

H. Minority Recommendation on Inclusion of Speeding

Our recommendation is that "speeding in close proximity to other vehicles or persons" should be added to section 76B(a). If it is not added, the use of the Multanova camera or similar

6. [1986] 2 S.C.R. 713 at 794, 55 C.R. (3d) 193 at 259.

technology as an effective and efficient means of enforcing speed limits will be lost.

I. Severance

If speeding is included within section 76B(a) and the courts do not agree with our opinion that the section can be sustained under the *Charter*, the court has the power to sever the paragraph which refers to speeding from the remainder of the section.[7]

7. A relatively recent example of the availability of severance may be found in *R.* v. *Holmes*, [1988] 1 S.C.R. 914, 64 C.R. (3d) 97. Chief Justice Dickson was willing to sever a portion of an enactment. The majority of the court, however, did not find the portion objectionable and consequently severance was unnecessary.

APPENDIX A

MOTOR VEHICLE ACT

R.S.B.C. 1979, C. 288

SELECTED PROVISIONS

PART I

PROVISIONS UNDER DIRECT CONSIDERATION
IN THE WORKING PAPER

Liability of owner for violation of Act

76. (1) The owner of a motor vehicle shall be held liable for any violation of this Act or the regulations, the *Highway Act* or the regulations under it, or the *Firearm Act* in respect of the carrying or use of firearms in motor vehicles, or the traffic bylaws of a municipality.

(1.1) No owner shall be held liable under subsection (1) where he establishes that

(a) the person who was, at the time of the violation, in possession of the motor vehicle was not entrusted by the owner with possession, or

(b) the owner exercised reasonable care and diligence when he entrusted the motor vehicle to the person who was, at the time of the violation, in possession of the motor vehicle.

(1.2) Where an owner is liable under this section, in place of the fine or term of imprisonment specified in an enactment for the offence, a fine of not more than $2000 or imprisonment for not more than 6 months or both may be imposed.

(2) On a prosecution of the owner of a motor vehicle for an offence under this section, the burden is on the defendant to prove that

(a) the person in possession of the motor vehicle was not a person entrusted by the owner with possession; or

(b) the registered owner is not the owner.

(3) An owner of a motor vehicle is liable under subsection (1) notwithstanding that the motor vehicle, at the time of the violation, is unattended or is not in the possession of any person.

(4) In this section "owner" includes a person in possession of a motor vehicle under a contract by which he may become the owner on full compliance with the contract, and in whose name alone the motor vehicle is registered.

Duty to give information

77. (1) Where a peace officer has reason to believe that a motor vehicle has been involved in an accident or in the violation of this Act, the *Commercial Transport Act* or the *Highway Act*, the regulations under any of these Acts or the bylaws of a municipality, and so informs the owner or a person in the motor vehicle, it is the duty of the owner or person, as the case may be, if required by the peace officer, to give all information it is in his power to give relating to the identification of the driver of the motor vehicle at the relevant time or during the relevant period.

(2) If the owner or other person fails to comply with subsection (1), or gives information which he knows to be false or does not believe to be true, he commits an offence against this Act.

Offence

78. Every person who, being in possession or control of a motor vehicle, permits it to be driven or operated by a minor who is not the holder of a subsisting driver's licence permitting that operation commits an offence against this Act.

Responsibility of owner in certain cases

79. (1) In an action to recover loss or damage sustained by a person by reason of a motor vehicle on a highway, every person driving or operating the motor vehicle who is living with and as a member of the family of the owner of the motor vehicle, and every person driving or operating the motor vehicle who acquired possession of it with the consent, express or implied, of the owner of the motor vehicle, shall be deemed to be the agent or servant of that owner and employed as such, and shall be deemed to be driving and operating the motor vehicle in the course of his employment.

(2) Nothing in this section relieves a person deemed to be the agent or servant of the owner and to be driving or operating the motor vehicle in the course of his employment from the liability for such loss or damage.

(3) Where a motor vehicle has been sold, and is in possession of the purchaser under a contract of conditional sale whereby the title to the motor vehicle remains in the seller until the purchaser becomes the owner on full compliance with the contract, the purchaser shall be deemed an owner within the meaning of this section, but the seller or his assignee shall not be deemed an owner within the meaning of this section.

Liability of partners

80. Each member of a licensed partnership is liable to the penalties imposed against licensees for breach of this Act.

Liability of licensees for offences of employees

81. (1) The registered owner of a motor vehicle by means of or in respect of which motor vehicle an offence against this Act or the regulations with respect to the equipment or maintenance of the vehicle is committed by his employee, servant, agent or worker, or by any person entrusted by him with the possession of the motor vehicle, shall be deemed to be a party to the offence so committed, and is personally liable to the penalties prescribed for the offence as a principal offender.

(2) Nothing in this section relieves the person who actually committed the offence from liability for it.

(3) On every prosecution of a registered owner of a motor vehicle for an offence against this Act or regulations that has been committed by means of or in respect of that motor vehicle, the burden of proving that the offence was not committed by him and that the person committing the offence was not his employee, servant, agent or worker, or a person entrusted by him with the possession of the motor vehicle is on the defendant.

PART II

OTHER PROVISIONS MENTIONED OR DISCUSSED

Definitions [in part]

1. In this Act

"motor vehicle" means a vehicle, not run on rails, that is designed to be self propelled or propelled by electric power obtained from overhead trolley wires;

"owner" includes a person in possession of a motor vehicle under a contract by which he may become its owner on full compliance with the contract;

"peace officer" means a constable or a person having a constable's powers;

"vehicle" means a device in, on or by which a person or thing is or may be transported or drawn on a highway, except a device designed to be moved by human power or used exclusively on stationary rails or tracks.

Offences

12. (1) Every person commits an offence who drives, operates, parks or is in charge of a motor vehicle or trailer on a highway

(a) without the licence required by this Act for the operation of that motor vehicle or trailer having been first obtained and being then in force;

(b) without displaying on it, in the manner prescribed, the number plates issued or designated by the superintendent or otherwise prescribed to be displayed on that motor vehicle or trailer for the current licence year of that motor vehicle or trailer; or

(c) which has displayed on it a number plate other than those issued or designated by the superintendent or otherwise prescribed to be displayed on that motor vehicle or trailer for the current licence year of that motor vehicle or trailer.

(2) Every peace officer, officer or constable of the Royal Canadian Mounted Police or the police force of a municipality or inspector authorized by the superintendent to inspect motor vehicles at inspection stations operated by the government may seize a number plate which he finds detached from a motor vehicle or trailer, or he finds displayed on a motor vehicle or trailer other than the one for which it was issued, or that is required by this Act, the regulations or order of the superintendent to be surrendered, and may hold it pending the receipt of instructions from the superintendent as to its disposal.

(3) Subsection (2) applies in respect of number plates and motor vehicles whether on a highway or elsewhere, and for the purposes of that subsection the peace officer, officer or constable may enter without warrant the land or premises of any person on or in which there is a motor vehicle or trailer.

(4) Subsection (2) does not apply to dealers' number plates used as permitted by this Act or to number plates detached pursuant to the regulations.

Offences

23. (1) A person, except when accompanied by a person authorized by the superintendent to examine persons as to their ability to drive and operate motor vehicles, shall not drive or operate a motor vehicle on a highway unless, in addition to any licence or permit which he is otherwise required to hold under this Act, he holds a subsisting driver's licence issued to him under this Act of a class appropriate to the category of motor vehicle driven or operated by him.

(2) Everyone who contravenes subsection (1) commits an offence.

(3) A person shall not drive or operate a motor vehicle or trailer on a highway unless

(a) he is insured under a valid and subsisting driver's certificate; and

(b) the motor vehicle and the trailer, if any, are insured under a valid and subsisting motor vehicle liability policy evidenced by an owner's certificate,

but paragraph (a) does not apply to a person who is driving or operating a motor vehicle pursuant to a valid and subsisting driver's licence issued to him under section 24(6) to enable him to learn to drive a motor vehicle.

(4) A person who contravenes subsection (3) commits an offence and is liable on conviction

(a) where the contravention is under subsection (3)(a), to a fine of not more than $250 or to imprisonment for not more than 3 months, or to both; and

(b) where the contravention is under subsection (3)(b), to a fine of not less than $300 and not more than $2000 or to imprisonment for not less than 7 days and not more than 6 months, or to both.

(5) A person commits an offence who

(a) produces to a peace officer or to the superintendent

(i) a motor vehicle liability insurance card or a financial responsibility card purporting to show that there is in force a policy of insurance that is, in fact, not in force;

(ii) a financial responsibility card purporting to show that he is at that time maintaining in effect proof of financial responsibility as required by this Act when that is not the case;

(iii) a motor vehicle liability insurance card or a financial responsibility card issued in respect of insurance that does not apply to the motor vehicle he is driving or operating; or

(iv) a driver's certificate in the name of another person;

(b) gives or loans to a person not entitled to have it a motor vehicle liability insurance card or a financial responsibility card; or

(c) fails to deliver to the superintendent for cancellation as required by section 103 a financial responsibility card.

(6) Subsection (3) does not apply to a motor vehicle or trailer registered or owned by a person resident outside the Province that complies with section 20, or to a driver or operator resident outside the Province who complies with section 31, unless

(a) the superintendent has required proof of financial responsibility under this Act or regulations and the owner or driver has not given proof satisfactory to the superintendent; or

(b) the licence of the owner or driver has been suspended under this Act or the regulations.

Duty of driver at accident

62. (1) The driver or operator or any other person in charge of a vehicle that is, directly or indirectly, involved in an incident on a highway shall

(a) remain at or immediately return to the scene of the incident;
(b) render all reasonable assistance; and
(c) produce in writing to any other driver involved in the incident and to anyone sustaining loss or injury, and, on request, to a peace officer or to a witness
  (i) his name and address;
  (ii) the name and address of the registered owner of the vehicle;
  (iii) the licence number of the vehicle; and
  (iv) particulars of the motor vehicle liability insurance card or financial responsibility card for that vehicle,

or such of that information as is requested.

(2) The driver of a vehicle that collides with an unattended vehicle shall

(a) stop;
(b) locate and notify in writing the person in charge of or the owner of the unattended vehicle of
  (i) the name and address of the driver;
  (ii) the name and address of the registered owner; and
  (iii) the licence number of the vehicle that struck the unattended vehicle; or
(c) shall leave in a conspicuous place in or on the vehicle collided with a notice in writing giving the information referred to in paragraph (b).

(3) The driver of a vehicle involved in an incident resulting in damage to property on or adjacent to a highway, other than a vehicle under subsection (2), shall take reasonable steps to locate and notify in writing the owner or person in charge of the property of the fact of the incident and of the

(a) name and address of the driver;
(b) name and address of the registered owner; and
(c) licence number of the vehicle.

Use of another's licence or permit; failure to permit inspection

64. Every person commits an offence who, while driving, operating or in charge of a motor vehicle on a highway

(a) uses or is in possession of a driver's licence or salesman's licence belonging to another person, or a permit, certificate, motor vehicle liability insurance card, financial responsibility card or consent issued or given under this Act or the regulations belonging to another person, or a fictitious or invalid licence, permit, certificate, motor vehicle liability insurance card, financial responsibility card or consent purporting to be issued or given under this Act; or
(b) refuses or fails to produce a subsisting driver's licence, permit, certificate, motor vehicle liability insurance card, financial responsibility card, or consent issued to him under this Act or the regula-

tions when requested by a peace officer or constable to do so, or refuses or fails to permit it to be taken in hand for the purpose of inspection by the peace officer or constable.

Production of motor vehicle licences

65. Every person commits an offence who, being in possession or control of a motor vehicle or trailer for which a licence has been issued under this Act, and being requested by a peace officer or constable to produce or exhibit the licence, refuses or fails to do so.

Failing to stop and state name

67. (1) A peace officer may require the driver of a motor vehicle to stop and the driver of a motor vehicle, when signalled or requested to stop by a peace officer who is readily identifiable as a peace officer, shall immediately come to a safe stop.

(2) When requested by a peace officer, the driver of a motor vehicle or the person in charge of a motor vehicle on a highway shall state correctly his name and address and the name and address of the owner of the motor vehicle.

(3) Every person who contravenes subsection (1) or (2) commits an offence and is liable to a fine of not less than $100 and not more than $2000 or to imprisonment for not less than 7 days and not more than 6 months, or to both.

General offence

69. A person who contravenes a section of this Act by doing an act that it forbids, or omitting to do an act that it requires to be done, commits an offence.

Prohibition against driving for failing to stop

92.1 (1) A driver of a motor vehicle commits an offence where

(a) he

(i) is signalled or requested to stop by a peace officer who is readily identifiable as a peace officer, and

(ii) fails to come to a safe stop, and

(b) a peace officer pursues the driver in order to require him to stop.

(2) Where a person commits an offence under subsection (1), he is liable to a fine of not less than $300 and not more than $2000 or to imprisonment for not less than 7 days and not more than 6 months or to both.

(3) Where a person is convicted of an offence under subsection (1), the court shall prohibit the person from driving a motor vehicle for a period of 3 years from the date of sentencing notwithstanding that he is or may be subject to another prohibition from driving under this Act.

(4) Section 90 (4) applies to a prohibition ordered under this section.

(5) Subsection (3) does not apply where neither the defendant nor his agent or counsel appears before the court at the time of conviction.

(6) Where a person is charged with an offence under subsection (1) and the evidence does not prove the offence but does prove a contravention of section 67(1), the person may be convicted of contravening section 67(1).

Interpretation [in part]

115. In this Part

"driver" means a person who drives or is in actual physical control of a vehicle;

"owner" as applied to a vehicle means

(a) the person who holds the legal title to the vehicle;
(b) a person who is a conditional vendee, a lessee or a mortgagor, and is entitled to be and is in possession of the vehicle; or
(c) the person in whose name the vehicle is registered;

Obeying traffic controls

130. Except where otherwise directed by a peace officer or a person authorized by a peace officer to direct traffic, every driver of a vehicle and every pedestrian shall obey the instructions of an applicable traffic control device.

Obedience to speed signs

145. Where traffic control devices as indicated in section 143 or 144 are erected or placed on the highway, a person shall not drive or operate a vehicle at a greater rate of speed than, or in a manner different from, that indicated on the signs.

Careless driving prohibited

149. A person shall not drive a motor vehicle on a highway

(a) without due care and attention;
(b) without reasonable consideration for other persons using the highway; or
(c) at a speed that is excessive relative to the road, traffic, visibility or weather conditions.

Signals on turning

172. (1) Where traffic may be affected by turning a vehicle, a person shall not turn it without giving the appropriate signal under sections 173 and 174.

(2) Where a signal of intention to turn right or left is required, a driver shall give it continuously for sufficient distance before making the turn to warn traffic.

(3) Where there is an opportunity to give a signal, a driver shall not stop or suddenly decrease the speed of a vehicle without first giving the appropriate signal under sections 173 and 174.

Approach of emergency vehicle

179. On the immediate approach of an emergency vehicle giving an audible signal by a bell, siren or exhaust whistle, and showing a visible flashing red light, except when otherwise directed by a peace officer, a driver shall yield the right of way, and immediately drive to a position parallel to and as close as possible to the nearest edge or curb of the road-

way, clear of an intersection, and stop and remain in that position until the emergency vehicle has passed.

Caution in backing vehicle

194. The driver of a vehicle shall not cause the vehicle to move backwards into an intersection or over a crosswalk, and shall not in any event or at any place cause a vehicle to move backwards unless the movement can be made in safety.

Driving on sidewalk

201. A driver shall not drive on a sidewalk, walkway or boulevard, except when entering or leaving a driveway or lane or when entering or leaving land adjacent to a highway, or by permission granted under a bylaw made under section 120.

Equipment of motor vehicles

216. (1) A person shall not drive or operate a motor vehicle or trailer on a highway or rent a motor vehicle or trailer unless it is equipped in all respects in compliance with this Act and the regulations.

(2) A peace officer

(a) may require a person who carries on the business of renting vehicles or who is the owner or person in charge of a vehicle

(i) to allow the peace officer to inspect a vehicle offered by the person for rental or owned by or in charge of the person, or

(ii) to move a vehicle described in subparagraph (i) to a place designated by the peace officer and to allow the vehicle to be inspected there by the peace officer, or, at the expense of the person required to allow the inspection, by a person authorized under section 215.1, and

(b) shall remove any inspection certificate of approval affixed to the vehicle where, in the opinion of the peace officer or a person authorized under section 215.1, the vehicle is unsafe for use on a highway.

Driving with more than 80 milligrams of alcohol in blood

220.1 (1) Everyone who, on a highway or industrial road, drives a motor vehicle or has the care or control of a motor vehicle, whether it is in motion or not, having consumed alcohol in such a quantity that the proportion thereof in his blood exceeds 80 milligrams of alcohol in 100 millilitres of blood, commits an offence and is liable on conviction to a fine of not less than $100 and not more than $2000 or to imprisonment for not less than 7 days and not more than 6 months, or to both.

(2) A person who is convicted of an offence under subsection (1) is automatically and without notice prohibited from driving a motor vehicle for 6 months as provided under section 92.

APPENDIX B

COMMERCIAL TRANSPORT ACT

R.S.B.C. 1979, C. 55, S. 15

Offence and penalty

15. (1) No person shall drive or operate on the highway a commercial vehicle which is overloaded or oversize except under the authority of a permit issued under this Act for the vehicle and in accordance with that permit and the regulations under this Act and the *Motor Vehicle Act*.

(2) A person who contravenes this section commits an offence, and is liable, on conviction

(a) for an oversize commercial vehicle, to a fine of not more than $500; and

(b) for an overloaded commercial vehicle, to a fine of not less than the amount prescribed by the regulations but not exceeding $500 and, in addition, to a penalty of not less than the amount prescribed by the regulations but not exceeding $6 for every 45 kg of overload, and, in default of payment of the fine, or the fine and penalty, is liable to imprisonment for a term not exceeding 6 months; and every contravention constitutes a separate offence.

(3) A person contravening any other provision of this Act or the regulations is liable, on conviction, to a fine of not more than $500 or to a term of imprisonment not exceeding 3 months, or both.